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No.

In The

Supreme Court of the United States

October Term, 1988

CENTRAL VIRGINIA EDUCATIONAL TELEVISION CORPORATION,

Petitioner,

v.

CHANG-SIN LEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether a public television station has a First Amendment right to broadcast an accurate and properly attributed account of a foreign government's official announcements, without incurring liability for potential defamatory material contained in those announcements.

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The petitioner, Central Virginia Educational Television Corporation ("CVETC"), requests that a writ of certiorari issue to review the judgment and majority opinion of the United States Court of Appeals for the Fourth Circuit entered in this case on June 20, 1988.[1]

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are reported at 849 F.2d 876 (4th Cir. 1988) (Appendix "A"). The

[1] The parties to the proceeding in the Court whose judgment is sought to be reviewed are: Chang-Sin Lee, Appellant in the Fourth Circuit; CVETC, an appellee in the Fourth Circuit; and the Sae Gae Times, the Dong-A Ilbo, The Korea Times, The Cho-Sun Ilbo America, Inc., The Joong-Ang Ilbo Daily News, Inc. and the Korea Herald (U.S. Edition), also appellees in the Fourth Circuit.

CVETC has six subsidiaries: 1). WNVC-TV; 2). WNVT-TV; 3). WCVE-FM Radio; 4). WHTJ-TV; 5). WCVE-TV; and 6). WCVW-TV.

Order of the Court of Appeals denying *en banc* rehearing is not yet published (a copy of the Order is attached as Appendix "B"). The opinion of the United States District Court for the Eastern District of Virginia is unpublished (a copy is attached as Appendix "C").

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 1988. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by the Court of Appeals on October 14, 1988. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(l).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Two constitutional provisions are involved. "Congress shall make no law ... abridging the freedom of speech, or of the press ...." U.S. Const. Amend. I. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law ...." U.S. Const. Amend. XIV, §1.

STATEMENT OF THE CASE

A. The South Korean Government's Press Release.

This case arises out of a public television station's broadcast of a news report aired originally in the Republic of Korea ("South Korea"). The news report dealt with a joint announcement issued by two agencies of the Government of South Korea. On September 9, 1985, the National Security and Planning Agency ("NSPA") and the Military Security Command ("MSC") issued a sixty-two page press release announcing that the South Korean Government had disrupted espionage networks operating in the United States and the Federal Republic of Germany ("West Germany").

The press release announced that twenty-two persons had been arrested on charges of spying for the Democratic People's Republic of Korea ("North Korea"). The South Korean authorities also issued details about other alleged North Korean agents living in the United States and West Germany. Among the exhibits and materials accompanying the press release was a chart showing how these agents were organized. Thirty people were identified on this chart as North Korean agents operating in the United States, including an individual named "Lee Chang Shin."

This news story was of major importance in South Korea, and it was extensively reported in all the major daily newspapers. It received top billing in the nightly news broadcast on Korean Broadcasting System ("KBS"), the state-sponsored television station.

During this news broadcast (a full translation of which appears in Appendix "D") the newscaster did not mention the name "Lee Chang Shin." As the newscaster summarized the government's announcement, two charts were televised for eleven seconds. These charts depicted the same organizational framework as that described by the South Korean Government in the press release. The charts contained a listing of names, including the name "Lee Chang Shin", in the same configuration as the chart issued by the South Korean Government (App. 32-33). The KBS news announcer properly attributed the source of the press release to the NSPA and MSC, and, while the charts were being televised, she reported that these two agencies had "made a special announcement" about the spy ring and had "released" information pertaining to the incident (App. 17 n.12).

B. The Rebroadcast of The KBS News Story by WNVC-TV.

WNVC-TV is a small, non-profit, non-commercial television station broadcasting as Channel 56 from Falls Church, Virginia. It is wholly owned by CVETC and has a total viewing audience of less than 19,000 (App. 13-14, n.5). As a public service, it broadcasts programs in a wide variety of languages to serve the heterogeneous ethnic communities living in and around Washington, D.C. (*Id.*).

In December, 1984, WNVC-TV started to broadcast a one-hour, Sunday morning Korean-language program called "Korean Entertainment." This program contained various items of interest to the South Korean community, including local and South Korean news reports. The South Korean news reports came from KBS in Seoul.

WNVC-TV rebroadcast the KBS news report, in Korean, on Sunday, September 15, 1985.

C. Proceedings in the Lower Courts.

Asserting that he was not a North Korean agent, the respondent, Chang-Sin Lee ("Lee"), filed his Complaint in the United States District Court for the Eastern District of Virginia. He charged that six Korean-language newspapers, and CVETC, had libeled him by reporting summaries of the press release.[2]

CVETC subsequently moved for summary judgment, arguing that a constitutional and common law privilege protects accurate and properly attributed accounts of the news announcements issued by foreign governments. Lee conceded in the district court that the WNVC-TV rebroadcast of the KBS news program was "an accurate and impartial" summary of what the South Korean government had announced in its press release (App. 16, App. 23). The district court granted CVETC's motion for summary judgment on March 23, 1987. The district court ruled that the press enjoyed a privilege to report accurate accounts of a foreign government's official announcements (App. 25-26). The district court also recognized that there has recently been "an uprising trend towards recognition of 'a constitutional privilege of fair report'" (App. 22), and it ruled that the common law privilege "safeguards interests analogous to those guaranteed by the First Amendment, the right of persons anywhere in the United States to be informed of what governments in this nation and throughout the world are doing" (App. 26).

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[2] At the close of all discovery Lee had not been able to identify a single person who had seen the WNVC-TV broadcast.

Lee appealed to a three-judge panel of the United States Court of Appeals for the Fourth Circuit, which reversed the district court's judgment. In an opinion dated June 20, 1988, the majority held, over a strongly-worded dissent, that the privilege attendant to reporting of federal, state and local governments' activities does not extend to the reporting of foreign governments' announcements, even when such reporting is accurate and impartial and the announcements are properly attributed. The majority acknowledged that its decision "might have some chilling effect" on the press (App. 6). The majority also noted that several of this Court's cases have "recognized the existence of First Amendment considerations in the reporting of official actions" (App. 2). Finally, the majority acknowledged that the Second Circuit has recognized a constitutional privilege of neutral reportage based upon this Court's recent decisions (*id.*).

CVETC moved for a rehearing and suggested a rehearing *en banc* because the majority opinion was in conflict with the decisions rendered in other circuits which have held that such a privilege is constitutionally mandated. Lee opposed a rehearing, arguing that CVETC's contentions were more appropriately addressed to this Court in a petition for certiorari. The motion for rehearing was denied on November 7, 1988.

REASONS FOR GRANTING THE WRIT

At stake in this case is the right and ability of every citizen to receive news from foreign sources. The opinion below imposes great restrictions upon the freedom of the press to report on foreign news. The majority below erred in failing to recognize that accurate, disinterested reporting of foreign press releases enjoys the absolute First Amendment privilege of "neutral reportage." This privilege is recognized in the Second Circuit. Furthermore, the majority below failed to recognize that the press also enjoys a "qualified" privilege to report accurately the doings of foreign governments. That qualified privilege is universally accepted under the common law, and is mandated by the First Amendment.

A. The Decision Below Emphasizes the Confusion Among the Circuits on the Constitutional Status of the First Amendment Privilege of "Neutral Reportage" and It Conflicts with Decisions Rendered in Other Circuits.

This case turns on an issue of first impression in the United States. The district judge held that the American public has a "right to be informed of what governments in this nation and throughout the world are doing." (App. 26). The Fourth Circuit's majority opinion disagrees, and holds that the press has no constitutional privilege to make accurate and impartial reports of the announcements made by foreign governments. Such announcements are themselves a form of pure news. News is not the creation of the writer "but is a report of matters that ordinarily are *publici juris*; it is the history of the day." *International News Service v. Associated Press,* 248 U.S. 215, 234 (1918). The opinion below imposes great restraints upon the freedom of the press to report "the history of the day."

Fourteen years ago this Court noted that it had "struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325 (1974). Fine distinctions and delicate balancing have characterized this "proper accommodation" ever since. This Court has consistently stressed, however, that "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (*Citing Mills v. Alabama*, 384 U.S. 214, 218 (1966)). The Court has never intimated that the press is privileged to discuss only the affairs of government in this country, as opposed to foreign countries, and, indeed, has commented that the First Amendment rejects the "highly paternalistic" approach of laws which restrict what the public may hear. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.31 (1978).

The Court has also invoked the First Amendment's protective aegis when the press publishes accurate reports of public documents issued by, or filed with, the organs of government. The Court has observed that "[t]he special protected nature of accurate reports of judicial proceedings has repeatedly been recognized" and that "[o]nce true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 493, 496 (1975).

The press has a "special and constitutionally recognized role" in educating the public, *Bellotti*, 435 U.S. at 781, and, in fulfilling that role by publishing accurate details of government documents, which might contain defamatory inaccuracies, the press has been accorded the fullest protections demanded by the First Amendment. *Time, Inc. v. Pape*, 401 U.S. 279, 291-92 (1971). In fact, the Court has recognized that "perhaps the largest share of news concerning the doings of government appears in the form of accounts of reports, speeches, press conferences, and the like." *Id.* at 286.

At least two circuit courts of appeals have interpreted *Cox*, *Landmark* and *Pape* as pointing to the explicit recognition of "a constitutional privilege of fair report." *Medico v. Time, Inc.*, 643 F.2d 134, 143 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981); *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113, 120 (2d Cir.), *cert. denied sub nom. Edwards v. New York Times Co.*, 434 U.S. 1002 (1977). This view is supported by scholarly commentary. *See generally* Sowle, *Defamation and the First Amendment: The Case For A Constitutional Privilege of Fair Report*, 54 N.Y.U. L. Rev. 469, 518 (1979).

In *Edwards* serious charges of lying were levelled at a noted environmental scientist[3] by the National Audubon Society. 556

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[3] Although this scientist was classified as a public figure by the *Edwards* court, that classification was not essential to the decision. Later commentators have pointed out that the rationale of *Edwards* applies regardless of whether the plaintiff is a public or private figure. *See* Note, *The Developing Privilege of Neutral Reportage*, 69 Va. L. Rev. 853, 870 (1983) ("The requirement that the plaintiff be a public figure does not flow inexorably from the logic of the privilege. The first

F.2d at 120. The Second Circuit explicitly recognized a First Amendment privilege of "neutral reportage" to report charges made by such a "responsible, prominent organization." *Id.* The Second Circuit observed that "*what is newsworthy about such accusations is that they were made....* The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them." *Id.* (Emphasis added).

Edwards has received extensive applause from the commentators. *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 68 (2d Cir. 1980). *See also* Note, *The Developing Privilege of Neutral Reportage*, 69 Va. L. Rev. 853, 858 n.26 (1983); Note, *Protecting The Public Debate: A Proposed Constitutional Privilege of Accurate Republication*, 58 Tex. L. Rev. 623, 625 (1980); Comment, *Constitutional Privilege to Republish Defamation*, 77 Colum. L. Rev. 1266, *1284* (1977). Furthermore, one lower court in the Ninth Circuit has specifically followed the lead of *Edwards* in recognizing the First Amendment privilege of "neutral reportage." *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1127 (N.D. Cal. 1984).

Edwards' "neutral reportage" privilege has been criticized and rejected in two circuits, the Third Circuit in *Dickey v. CBS, Inc.*, 583 F.2d 1221, 1226 (3d Cir. 1978),[4] and the Fourth Circuit in the decision below.

This case involves a factual context never before considered by any American court. It deals with a report of a foreign government's official announcement which all parties concede to be "accurate and impartial" (App. 16), which was properly attributed to the agencies issuing the press release (App. 17), and which was attended by neither commentary nor embellishment on the part of CVETC.

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amendment interest in reporting that a charge was made may remain just as strong when the person attacked is a private figure.").

[4]Three years after *Dickey*, however, the Third Circuit retreated from its rejection of *Edwards*, indicating that a constitutional privilege of fair report has been presaged by this Court's recent cases. *Medico*, 643 F.2d at 143. The Third Circuit's *volte-face* highlights the confusion rampant in this area of the law.

The majority below declined to recognize any privilege, partially because foreign governments "are not necessarily familiar, open, reliable, or accountable" as governmental entities in this country (App. 5). The majority expressed concern that members of the American public might be "hard pressed to evaluate the reliability of reports issued by other allegedly 'neutral' governments", and it expressed an unwillingness "to impute to most Americans sufficient knowledge with regard to the due process procedures of foreign courts of the accountability of foreign government agencies" (App. 6). This Court, however, has resoundingly rejected the same sort of "highly paternalistic" view of what the public may and may not hear. *Bellotti*, 435 U.S. at 791 n.31. This Court has also noted that "the censorial power is in the people over the Government, and not in the Government over the people." *New York Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964).

Furthermore, such a parochial and narrow viewpoint of the meaning of "news" is out of step with the realities of modern international life. It is also incompatible with the requirements of the First Amendment. As the district judge pointed out, the advances in communications and transportation, and the frequency of contacts between this country and foreign countries, particularly allies, make recognition of the privilege vital, because this is an era when "[n]ews from countries around the world increasingly affects our national security, trade, price of the dollar [and] interest rates ..." (App. 25).

The majority opinion below suggests that the official declarations of foreign governments are not worthy of the constitutional protections accorded to the National Audubon Society's unofficial charges by the Second Circuit in *Edwards*. The opinion below, therefore, creates a gaping split among the circuits on the protections mandated by the First Amendment for accurate, disinterested reporting of the news. Furthermore, the Fourth Circuit's majority opinion conflicts with the spirit of this Court's recent opinions in *Cox*, *Landmark* and *Pape*. In view of the exceptional importance of the issue, certiorari should be granted to review the Fourth Circuit's opinion, and to clarify the law in this turbid area.

B. The Burdens Imposed Upon the Press by The Decision Below Show Why a Constitutional Privilege of Neutral Reportage Must Be Recognized.

In this era of lightning communications and world interdependence, there can scarcely be any question that public announcements by foreign governments are matters of public concern in this country. This Court has repeatedly held that speech on matters of public concern occupies the highest rank on the hierarchy of First Amendment values and is entitled to special protection. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985).

The Fourth Circuit's majority opinion declares that "the burden of the press here in *verifying* reports from foreign governments does not sufficiently differ in nature or scope from the burden it bears when it receives information from domestic, non-official sources" (App. 7) (Emphasis added).

The dissent below pointedly highlights the fundamental constitutional flaws in this position. First, "in a case such as this, when the media party is relatively small, it may not have the financial or logistical wherewithal to confirm the accuracy of the information in the report" (App. 13-14). This is undeniably true of CVETC, with its Washington, D.C. viewing audience of less than 19,000.

Second, even assuming that it were possible to engage a foreign government's intelligence agencies in an investigative dialogue, "verifying" the reports of that government (especially when they involve sensitive issues of espionage and state security as in this case) might be impossible or take too much time "to make the publication of the report meaningful to its readership" (App. 14); *see International News Service,* 248 U.S. at 235. (Noting that news has a "peculiar" value dependent on its "novelty and freshness."). The result will inevitably be, as the dissent stressed, that small media "may all too often decide not to publish. As a result, certain segments of the American public -- such as the Korean-American public in this case -- will be deprived of access to information of great importance to them" (App. 14-15). Such a chilling effect is antithetical to the First Amendment's protection of "true

speech on matters of public concern." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 787 (1986).

Third, in a case like this, "verifying" the announcements made by a foreign government's intelligence agencies presents unique and insuperable problems. It is true that the "Lee Chang Shin" identified in the press release was accused of being a spy. The respondent may deny that he is a spy, but he cannot deny that "Lee Chang Shin" was alleged by the South Korean Government to be a spy. This is precisely what was reported in the WNVC-TV broadcast. Truth may not be the subject of civil sanctions where discussion of public affairs is concerned. *Hepps*, 475 U.S. at 787.

This Court noted in *Pape* that the largest share of the news concerning the doings of government appears "in the form of accounts of reports, speeches, press conferences, and the like," and that "[t]he questions of the 'truth' of such an indirect newspaper report presents rather complicated questions." 401 U.S. at 286. The Court did note, however, that "[w]here the source of the news makes bald assertions of fact-such as that a policeman has arrested a certain man on a criminal charge-there may be no difficulty." *Id.* Precisely such a "bald assertion of fact" is involved here.. If WNVC-TV had enjoyed the resources to have contacted the South Korean agencies to "verify" this report, and assuming those agencies would have responded, it would have discovered that the report was true. Even Lee does not dispute the accuracy of the story, other than to deny that he is what he was accused of being.

Finally, the majority opinion places an almost impossible burden of proof at trial upon media defendants. The majority below suggested that "[s]o long as a plaintiff must prove falsity and negligence" a media defendant's constitutional rights are sufficiently protected (App. 7). The dissent articulates why this is insufficient protection under the facts of this case (App. 13-15). In addition to the reasons articulated by the dissent, however, is the practical impossibility of compelling the attendance of representatives of foreign governments in American courts to verify the accuracy of the facts pertinent to press releases. A plaintiff's burden is simple, because he has merely to deny the foreign

government's charges. With that denial, the burden shifts immediately to the defendant to demonstrate the truth of the official charge. This shift in the burden of proof is not accompanied by the means to compel the testimony necessary to shoulder that burden.

It would be an anomaly of historic proportions, in a democratic society, to permit the free and constitutionally unrestricted reporting of the doings of all organs of federal, state and local government in this country, but to inhibit reporting of the same kinds of information about the governments of other countries. This kind of impermissible prior restraint is precisely why the Court should endorse the First Amendment privilege of "neutral reportage" recognized in *Edwards*. If news media in the United States cannot freely publish accurate details of a foreign government's official utterances, without fear of incurring libel liability, the chilling effect upon First Amendment freedoms is self evident. *See Sullivan*, 376 U.S. at 277 (Remarking upon fear of damage awards as a chilling factor in First Amendment analysis). Without the resources available to the large, national media, which have foreign news bureaus and extensive investigative reporting assets, small news services such as WNVC-TV would have no choice but to eschew any reporting at all.

As the Court stated in *Edwards*, "if we are to enjoy the blessings of a robust and unintimidated press, we must provide immunity from defamation suits where the journalist believes, reasonably and in good faith, that his report accurately conveys the charges made." 556 F.2d at 120. "Nor must the press take up cudgels against dubious charges in order to publish them without fear of liability for defamation." *Id.*

What a foreign government does or says is news. The privilege of "neutral reportage" should have protected the "accurate and impartial" reporting of the South Korean Government's press release in this case, and the anomalous result below illustrates why that privilege now needs constitutional endorsement by this Court.

C. This Court Should Clarify Whether the "Official Reports" Privilege, Universally Accepted Under the Common Law, is Constitutionally Required and Whether that Privilege Also Protects Accurate Reporting of Foreign Government's Announcements.

The common law "has long recognized a privilege for the press to publish accounts of official proceedings or reports even when these contain defamatory statements." *Medico*, 643 F.2d at 137. Section 611 of the Restatement (Second) Torts contains the most widely endorsed statement of the "official reports" or "fair report" privilege. "The publication of defamatory matter in a report of an official action or proceeding ... is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported." Restatement (Second) of Torts §611 (1977).[5]

The "official reports" privilege represents an exception to the common law rule that one who repeats or republishes a defamation uttered by another adopts it as his own. *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 739 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1141 (1986). The privilege "springs from the recognition that in a democratic society, the public has both the right and the need to know what is being done and said in government -- even if some of that is defamatory." *Id.*

As the majority opinion below points out, three rationales are traditionally cited as requiring the "official reports" privilege (App. 3), but the most important of these is "the public's right to know, [which] focuses on the public's interest in important matters" (App. 4). Indeed, the majority specifically observed that "Americans in general, and Korean-Americans in particular, have a strong interest in learning of the disruption of a spy ring in the United States by an American ally, South Korea" (*id.*). This observation illustrates why commentators see the privilege as "undoubtedly mandated by the first amendment." Hill, *Defamation and Privacy Under The First Amendment*, 76 Colum. L. Rev. 1205,

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[5] *See Lulay v. Peoria Star-Journal, Inc.*, 34 Ill. 2d 112,115, 214 N.E.2d 746, 748 (1966) ("Section 611 of the Restatement of Torts definitely expresses the prevailing, if not unanimous, weight of judicial authority.").

1211, n.19 (1976); Note, *supra*, 69 Va. L. Rev. at 858 n.26. The district judge below specifically recognized this when he observed that "[t]he privilege safeguards interests analogous to those guaranteed by the First Amendment ..." (App. 26).

This articulation of the privilege suggests its own limitations. The privilege is not "absolute", but "qualified" or "conditional",[6] as the dissent below remarked (App. 7). Once a media defendant has established the existence of a privilege, the burden shifts to the plaintiff to show that the defendant has abused the privilege by reporting the announcements incompletely or inaccurately, by embellishing them, or by failing properly to attribute the announcements to their official source. *Medico*, 643 F.2d at 146. This is a simple test to apply, and it should bear a constitutional mandate.

The scope of protection afforded by the common law privilege to the press has been extraordinarily extensive, and illustrates why it makes no sense to withhold this privilege from reports of foreign governments' actions. Section 611 protection has been extended not only to the reporting of actions of municipal authorities, like the Peoria Health Department in *Lulay*, but also to "accurate reports of admittedly inaccurate governmental reports." *Mathis v. Philadelphia Newspapers, Inc.*, 455 F. Supp. 406, 417 (E.D. Pa. 1978). It has been extended to the reporting of unofficial, unpublished government reports, *Ingenere v. A.B.C., Inc.*, No. 81-2894-Z, *slip op.* at 3-4 (D. Mass. Sept. 18, 1984) (internal GSA documents); *Village of Grafton v. American Broadcasting Co.*, 70 Ohio App. 2d 205, 213, 24 Ohio Ops. 3d. 359, 366, 435 N.E.2d 1131, 1137 (1980) (unpublished EPA documents), and also to secret F.B.I. files. *Medico*, 641 F.2d at 140-41 n.23.

The reason for constitutional recognition of this "conditional" privilege stems from the three public policy rationales traditionally cited as supporting it, the agency, supervisory and informational rationales. *See Medico*, 643 F.2d at 141-42. All

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[6] *See Sullivan*, 376 U.S. at 282 n.21, suggesting that an "absolute" privilege, as distinguished from a "conditional" privilege, adheres to the reporting of judicial, administrative and executive proceedings.

three policy considerations are present in this case as the majority opinion concedes (App. 3-4).

In an international setting, the justifications underlying the agency and supervisory rationales are arguably far more compelling than in a domestic setting. According to the agency rationale, the press serves merely as the agent of the person who, had he or she been present at the scene of the governmental report's release, could have read it for himself or herself. There is no question but that the press release was issued at a public news conference, and that it was "publicly available, at least in (South) Korea." (App.3). This press release was just as available for public scrutiny as any public document released to the press in the United States, and the burden of extensive international travel which would otherwise be imposed upon one who wished to be well informed of internationl events argues compellingly for a recognition of the privilege under this rationale.

Similarly, the American public has a strong supervisory interest in learning of events in a country which is not only a close ally, but which is also a recipient of American funds in the form of foreign aid. Additionally, the increasingly important trade ties between the United States and South Korea make information regarding South Korea's Government important to a wide variety of American interests. Even without such economic or diplomatic considerations, the American public still has a profound interest in the affairs of countries other than allies and foreign aid recipients. For example, information regarding human rights violations in the Soviet Union or South Africa is essential to the exercise of direct and indirect American influence to ameliorate those violations. To suggest that the American public has no supervisory interest in the affairs of other countries is to ignore over half a century of cooperative international effort since the establishment of the League of Nations and the United Nations. The supervisory rationale supporting the "official reports" privilege applies, therefore, with particular strength to reports issued by the governments of foreign countries.

By far the most compelling of the three traditionally cited rationales, however, is the informational rationale. "It is in the public interest that information be made available as to what takes place in public affairs, [so the press] ... has the privilege to report the acts of the executive or administrative officials of government." *Sciandra v. Lynett*, 409 Pa. 595, 600, 187 A.2d 586, 587-88 (1963). Not everything that is newsworthy is, however, a matter of public concern. *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 104 N.J. 125, 132, 516 A.2d 220, 225 (1986). The most cogent illustration of this comes from the British case remarked upon by both the majority and dissent in the court below, *Webb v. Times Publishing Co.* [1960] 2 All E.R. 789, 2 Q.B. 535.

In *Webb*, the plaintiff complained that she had been libeled when The Times published an account of a sensational Swiss murder trial. A British subject, Hume, on trial for murder in the Swiss courts, admitted that he had murdered the father of his wife's child in a fit of jealousy. Hume's wife, the plaintiff in the English case, complained that the publication of these charges imputed to her the crime of adultery, and was, therefore, libelous. *Id.* at 791, 2 Q.B. at 537-38.

The English court noted that there was no decisive precedential authority on the issue, but it reasoned that the common law requires that the newspaper article should be protected by a qualified privilege. First, the court stressed that "[t]here is ... undoubtedly the need for an *appropriate subject matter which must be of interest to the public concerned, in this case the English newspaper-reading public.*" *Id.* at 804, 2 Q.B. at 568 (Emphasis added).

Next, the court laid down the following rules to determine whether such "subject matter" existed:

> One has to look for a legitimate and proper interest as contrasted with an interest which is due to idle curiosity or a desire for gossip. There is not necessarily anything wrong with a newspaper publishing news items which appeal only to idle curiosity or the desire for gossip. But, if they do so, there is not in the subject-matter any

> such legitimate and proper interest as is needed to confer privilege for an incidental defamation that may be involved. *There is thus a test available for deciding whether the subject-matter is appropriate for conferring privilege*. A report of the decision of the United States Supreme Court on an important question of commercial law has legitimate and proper interest. On the other hand, a report of a judicial proceeding wholly concerned with a scandalous affair between Mrs. X and Mr. Y is unlikely to have such interest and is likely to appeal only to idle curiosity or a desire for gossip.

Id. at 805, 2 Q.B. at 569-70 (Emphasis added).

With great relevance for the issue of whether such a public interest attends accurate reporting of the South Korean press release, the English court stated that:

> Sometimes a report of foreign judicial proceedings will have intrinsic world-wide importance, so that a reasonable man in any civilized country, wishing to be well-informed, will be glad to read it, and would think he ought to read it if he has the time available. Sometimes a report of foreign judicial proceedings will not have such intrinsic world-wide importance, but will have a special connection with English affairs, so that it will have *a legitimate and proper interest for English readers, and the reasonable man in England will wish to read it or hear about it.*

Id., 2 Q.B. at 570 (Emphasis added).

When CVETC rebroadcast an accurate and impartial summary of the South Korean press release in the United States, this story was aimed at the South Korean community, anxious to be informed of, and entitled to be informed of, current affairs in their country of origin. This press release was of major interest to that viewing public, and CVETC enjoyed a "conditional" privilege to report it. The news story also had appeal to members of the

Korean-speaking American public who might wish to be well informed on matters of national and international interest.

The First Amendment demands that the press should be privileged to report, accurately and disinterestingly, the actions of foreign governments. If the privilege is abused it is lost. This simple, bright-line test is one of easy application and would avoid the conflicting, contradictory results that characterize this currently confused area of the law. A writ of certiorari should be issued to the Fourth Circuit to resolve this confusion.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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January 12, 1988

CERTIFICATE OF SERVICE

I, Linda Lemmon Najjoum, counsel for the Petitioner, and a member of the Bar of the Supreme Court of the United States, certify that three copies of this Petition for a Writ of Certiorari were hand-delivered on January 12, 1988 to each of the following: Steven M. Schneebaum, Esq. and Jonathan N. Halpern, Esq., Patton, Boggs & Blow, 2550 M Street, N.W., Washington, D.C. 20037, and to Larry Garber, Esq., International Human Rights Law Group, 773 15th Street, N.W., Washington, D.C. 20005, counsel for the Respondent Chang-Sin Lee; to Jack G. McKay, Esq., 437 North Lee Street, Alexandria, Virginia 22314, counsel for the Sae Gae Times; to Keh Soo Park, Esq., 2055 North 15th Street, Third Floor, Arlington, Virginia 22201, counsel for The Dong-A Ilbo, The Korea Times, The Cho-Sun Ilbo America, Inc., and The Joong-Ang Ilbo Daily News, Inc. and The Korea Herald (U.S. Edition); and that one copy was mailed by certified mail, return receipt requested, to the Honorable John M. Greacen, Clerk of the United States Court of Appeals for the Fourth Circuit, 10th and Main Street, Richmond, Virginia 23219.

Linda Lemmon Najjoum
Counsel of Record for Petitioner

APPENDIX A

Majority And Dissenting Opinions of The Court of Appeals
Chang-Sin Lee v. The Dong-A Ilbo,
849 F.2d 876 (4th Cir. 1988).

Chang-Sin LEE, Plaintiff-Appellant
v.
The DONG-A ILBO; Joong-Ang Ilbo; Cho-Sun Ilbo; The Korea Herald; Central Virginia Educational Television Corporation; The Sae Gae Shinbo, Inc.; The Korea Times, a/k/a Han-Kook Ilbo, Defendants-Appellees.
No. 87-2578

United States Court of Appeals, Fourth Circuit.
Argued Nov. 3, 1987.
Decided June 20, 1988.

Before MURNAGHAN and ERVIN, Circuit Judges, and KAUFMAN, Senior United States District Judge for the District of Maryland, sitting by designation.

ERVIN, Circuit Judge:

On September 9, 1985, two intelligence agencies of the South Korean government issued a sixty-two page "press release" announcing the disruption of two North Korean spy rings operating in the United States and West Germany. In Virginia, the defendants, six newspapers and one public television station, reported the announcement, essentially by repeating the story as reported in the Korean press. Plaintiff Chang-Sin Lee, a South Korean citizen living in New York, was identified in the accounts as a North Korean agent, and subsequently filed this libel action. The trial court granted summary judgment for the defendants based on the official report exception to the general rule of republication liability. Lee appeals. We reverse and remand.

Chang-Sin Lee immigrated to the United States in 1975 and is now a permanent resident alien. He graduated from Western Illinois University in 1984 and resides in New York City.

The press release was issued in South Korea by the National Security and Planning Agency and the Military Security Command, two South Korean intelligence agencies. It described the disruption of a student-run, North Korean spy ring operating in

the United States at Western Illinois University. The announcement was widely publicized in South Korea.

The defendants subsequently reported the announcement, relying mainly on the accounts in the South Korean press. In fact, some of the defendants simply reprinted the story as it appeared in Korea, and the television station aired a rebroadcast from the Korean Broadcasting System. All but one of the stories were in Korean, and all were targeted at the Korean-American community.

The court below held that the official report privilege extends to the republication of all government reports, foreign and domestic. To overcome the privilege, a plaintiff must show malice. Because Lee could not show malice, the court granted the defendants' motions for summary judgment.

The issue on appeal is both novel and straightforward. Does the official report privilege apply to reports based on the acts of foreign governments? The privilege is largely a creation of state defamation law. All parties agree that the applicable law is that of Virginia, where the statements were made. The Supreme Court has not found the privilege to be of constitutional dimension. *See Medico v. Time, Inc.*, 643 F.2d 134, 143-45 (3d Cir. 1981). The Court, however, has recognized the existence of First Amendment considerations in the reporting of official actions. *Id.; see Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978) (prohibiting criminal sanctions against publishers of information from confidential government proceedings); *Cox Broadcasting v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) (prohibiting invasion of privacy action for publication of public record -- the name of a deceased rape victim); *Time, Inc. v. Pape*, 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45 (1971) (holding based on lack of actual malice). In *Pape*, the Court noted that "perhaps the largest share of news concerning the doings of government appears in the form of accounts of reports, speeches, press conferences, and the like." *Pape*, 401 U.S. at 286, 91 S.Ct. at 637. At least one lower court has taken this concern and created a constitutional privilege in the reporting of newsworthy events.

Edwards v. National Audubon Society, 556 F.2d 113, 120 (2d Cir.), *cert. denied,* 434 U.S. 1002, 98 S.Ct. 647, 54 L.Ed.2d 498 (1977).

Under the republication rule, one who repeats a defamatory statement is as liable as the original defamer. *Medico,* 643 F.2d at 137. The rule is based on the legal fiction that the republisher adopts the defamatory statement as his own. *Id.* The official or fair report privilege is an exception to the rule of republication liability. It is a privilege to publish accounts of public proceedings or reports despite their defamatory nature. *Id.; Alexandria Gazette Corp. v. West,* 198 Va. 154, 159-60, 93 S.E.2d 274, 279 (1956); Restatement (Second) of Torts §611.[1] Apparently, American courts have never considered whether the privilege applies to reports based on the acts of foreign governments, although at least one English court has addressed the issue.[2]

The rationales underlying the privilege are particularly important because of this lack of prior law. The courts cite three policy rationales to support the official report privilege: agency, public supervision, and the public's right to know. *See Medico,* 643 F.2d at 140-42; *Webb v. Times Publishing, Inc.* 2 Q.B. 535, 3 W.L.R. 352, 2 All E.R. 789 (1960). Under the agency rationale, a reporter acts as an agent for those who could inform themselves. *Medico,* 643 F.2d at 140-41. Here, the defendants reported summaries of the press release which was publicly available, at least in Korea.

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[1] §611. Report of Official Proceedings or Public Meeting. The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

[2] *Webb v. Times Publishing Co.,* 2 Q.B. 535, 3 W.L.R. 352,2 All E.R. 789 (1960). In *Webb*, the court made a limited extension of the privilege to protect the reporting of a Swiss judicial proceeding involving an English citizen. The court emphasized the nature of the activity, a judicial proceeding, which has far more reliability than the press release of an intelligence agency. Still, the court refused to invoke a blanket privilege for all foreign judicial proceedings. The court found the report to be privileged, however, based on the legitimate and proper interest the English public had in it.

The public supervision rationale is the idea that government should function openly with an eye toward its public responsibilities. *Id.* at 141. This rationale does not generally apply to the acts of foreign governments who are not accountable to the American people. It is arguable, however, that South Korea's position as an ally and foreign aid recipient creates an American public supervision interest, that Americans need to know about the activities of such governments in order to supervise our own government.

The informational rationale, or the public's right to know, focuses on the public's interest in important matters. *Id.* at 142. This is the most directly applicable rationale in the instant case, and the district court relied on it to apply the privilege. Americans in general, and Korean-Americans in particular, have a strong interest in learning of the disruption of a spy ring in the United States by an American ally, South Korea. Espionage in the United States is clearly a legitimate public concern.

Standing alone, an analysis of these policy considerations supports the extension of the official report privilege to reports of foreign government activities. The information was publicly available, so the agency rationale applies; the activities of an ally and foreign aid recipient arguably create a supervisory interest; and foreign espionage in the United States is important to the public. Other considerations, however, lead us not to extend the privilege in this case.

Three primary considerations weigh against extending the privilege. First, the rationales are not as persuasive in the context of foreign government activities. The informational rationale applies to all matters of importance no matter what their source, while the other rationales are less important when reports involve foreign governments. The agency rationale is weakened because the information here was available only in Korea. It was not readily available to those who chose to inform themselves, so the defendants were not acting as mere agents by reporting it. The public supervision rationale applies only indirectly. The American public

cannot influence the Korean government directly, and cannot influence many foreign governments at all.

Second, we usually extend the privilege because of the nature of the relationship we share with our own government. We are familiar with the workings of our government and consider it to be open and reliable. We can also hold our own government accountable for its actions. Foreign governments, like non-governmental sources of information, are not necessarily familiar, open, reliable, or accountable. Therefore, we think it unwise to provide a blanket privilege to those who report the activities of foreign governments.

Third, extending the privilege in a piece-meal fashion would be extremely difficult. Establishing criteria based on openness and reliability would be hard enough, but objectively applying the criteria would be nearly impossible. Reasonable persons could differ as to which governments, besides our own, exhibit the openness and reliability that warrant an extension of the privilege. Because negligence and falsity are part of a plaintiff's burden under Virginia law, it is unnecessary to extend the privilege any further. *See Great Coastal Express, Inc. v. Ellington,* 230 Va. 142, 151, 334 S.E.2d 846, 852 (1985).

The dissent suggests making a case-by-case determination based on the importance of the information. There are several problems with this analysis.

First, the dissent places too much emphasis on the public's right to know and the importance of the defamatory information. While the "matters of public concern" are "at the heart of the First Amendment's protection," *First Union National Bank of Boston v. Bellotti,* 435 U.S. 765, 776, 98 S.Ct. 1407, 1415,55 L.Ed.2d 707 (1978), the State's interest in compensating private individuals for injury to their reputation remains strong and legitimate and must be balanced against the First Amendment interest. *See Dun & Bradstreet, Inc. v. Greenmoss Builders,* 472 U.S. 749, 757, 105 S.Ct. 2939, 2944, 86 L.Ed.2d 593 (1985). In *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997,41 L.Ed.2d 789 (1974), the Supreme Court held that the fact that expression concerned a public issue

did not by itself entitle the libel defendant to the constitutional protections of *New York Times*. *Id.* at 343,94 S.Ct. at 3008. The Court allowed the plaintiff, who was a private figure, to recover actual damages so long as he was able to prove some fault on the part of the defendant, despite the public nature of the defamatory statement. *Id.* at 347-50, 94 S.Ct. at 3010-12. Likewise, the fact that the defamatory expression concerned a public issue should not entitle the defendant to the common law protection of the official reports privilege.

Second, the dissent's analysis would result in a blanket application of the privilege. The mere fact that the report was officially issued by a foreign government would give that report an imprimatur of "public interest." The reports of a foreign government will almost always be of great importance to some individual or some group in a heterogeneous society such as our own. In *Webb,* the court found that the information regarding the sexual liaisons of a married woman was deemed to be worthy of "public interest" status because the subject matter dealt with testimony that was given in a domestic criminal trial. Such a standard would lead to an unlimited application of the privilege while affording no protection to the defamed private person.

Third, proper attribution in the republication by itself would not necessarily discourage false or undeserved reliance on a foreign government's report. While most readers would be skeptical of reports issued by governments that are openly hostile to the interests of the United States or of Americans, they would be hard pressed to evaluate the reliability of reports issued by other allegedly "neutral" governments. We are unwilling to impute to most Americans sufficient knowledge with regard to the due process procedures of foreign courts of the accountability of foreign government agencies. Therefore, even with proper attribution, we are not willing to expand the applicability of the privilege.

We do acknowledge that not extending the privilege might have some chilling effect on newspapers and television stations. Without the privilege, they assume the risk that hastily gathered

and promulgated information is incorrect. *Mills v. Kingsport Times-News,* 475 F. Supp. 1005, 1011 (W.D. Va. 1979). Even mere negligence constitutionally can be the basis for liability when the defamed party is a private person, *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *The Gazette, Inc. v. Harris,* 229 Va. 1, 15, 325 S.E.2d 713, 727 (1985), *cert. denied sub nom., Fleming v. Moore,* 472 U.S. 1032, 105 S.Ct. 3513, 87 L.Ed.2d 643 (1985). We believe, however, that the burden on the press here in verifying reports from foreign governments does not sufficiently differ in nature or scope from the burden it bears when it receives information from domestic non-official sources. Because we find that foreign governments are not necessarily more reliable than domestic non-official sources, we are not willing to enlarge the scope of the privilege to include information from such governments. Some countries may take advantage of our liberal First Amendment rights in order maliciously to defame or, carelessly and without adequate inquiry, excoriate private parties. In our opinion, therefore, the burden on the press is outweighed by the possible harm to the reputation of private persons.

Based on the preceding analysis of the official report privilege, its underlying rationales, and other considerations, we hold that the privilege does not apply to reports based on the press release issued by the South Korean government. So long as a plaintiff must prove falsity and negligence, it is unnecessary to extend the privilege any further. Summary judgment for the defendants based on the privilege was inappropriate, and the case is

REVERSED AND REMANDED.

FRANK A. KAUFMAN, Senior District Judge, dissenting:

For the reasons stated by Judge Ervin, I agree with the majority that it is "unwise to provide a *blanket* privilege to those who report the activities of foreign governments." Ante at 879 (emphasis added). However, while the issue certainly is a close one, in my view the recognition rather than rejection of a *qualified* privilege would strike a more appropriate balance between the need to protect an individual's reputation and the American public's need to have knowledge of the acts of foreign govern-

ments. Accordingly, I dissent from the majority's reversal of the district court's grant of summary judgment. For the reasons stated in Part II of this opinion, I would, however, remand for further proceedings concerning plaintiff's claims against the seven defendants to determine whether proper attribution was made by each of them.

I.

The majority states that courts should not involve themselves in assessing the reliability and openness of the operations of a foreign government in order to determine whether, in a given case, the fair report privilege should apply. I agree that courts should always keep that problem in mind. But that does not necessarily mean that courts are not fully capable of assessing the importance of a particular publication to a particular audience. By relying on that criterion, courts would be able to extend the privilege on a case-by-case basis as the need arises. As the current lack of case law in this area indicates, the issue of the fair report privilege in the foreign government context would hardly appear to arise often enough to make a case-by-case application unduly burdensome. Such an ad hoc approach is not new to defamation law; for example, application of the public figure doctrine presents "a question of law to be resolved by the court" in *each* case in which the issue is present. *Dameron v. Washington Magazine, Inc.* 779 F.2d 736, 740-43 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1141, 106 S.Ct. 2247,90 L.Ed.2d 693 (1986). *See also id* at 740-43.[1]

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[1] In *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), a private figure case, Justice Powell expressed concern about forcing state and federal judges to decide on an ad hoc basis which publications address issues of "general or public interest". *Id* at 346, 94 S.Ct. at 3010; *see also id.* at 345-46, 94 S.Ct. at 3009-10. However, in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767,106 S.Ct. 1558, 89 L.Ed.2d 783 (1986), another private figure case, Justice O'Connor focused on the importance of the information being published. *See id.* at 774-78, 106 S.Ct. at 1562-65. Also, in his plurality opinion in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985), Justice Powell discussed whether the information was of public or private concern. *See id.* at 761-63, 105 S.Ct. at 2946-47. And, in *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), Justice White wrote: "Whether an employee's speech addresses a matter of public concern must be determined

As Judge Ervin has written, ante at 878, there are "three policy rationales [which] support the official report privilege: agency, public supervision, and the public's right to know." In a given context, one of those rationales may well be given more weight than the others. *See Medico v. Time, Inc.*, 643 F.2d 134, 142 (3d Cir.), *cert. denied*, 454 U.S. 836, 102 S.Ct. 139, 70 L.Ed.2d 116 (1981); Note, *Privilege to Republish Defamation*, 64 Colum.L.Rev. 1102, 1102 (1964). In this case, as the majority opinion suggests, *see* ante at 7, the importance of the public supervision rationale does not loom too large. However, at least in the United States, the fact that citizens in one state have no direct ability to supervise state governmental activity in another state apparently does not affect the application of the official report privilege when the report, although issued by the government of the first state, is republished in the second state. Also, as the success of many international human rights group demonstrates, the importance of *indirect* supervision, *i.e.*, public pressure, is a factor to be considered. With regard to the agency rationale, its importance *per se* is questionable *whenever* the government report is not available for public inspection, whether the government by our own or foreign. *See, e.g., Medico*, 643 F.2d at 140-41 & n. 23 (discussing the inapplicability of the agency rationale in a case involving republishing of secret FBI report); *see also Coleman v. Newark Morning Ledger Co.*, 29 N.J. 357, 149 A.2d 193, 205-06, 209 (1959) (concerning the republication of secret U.S. Senate proceeding).

Because the agency and public supervision rationales are less important in a case such as this one, it is the third factor, the public's right to know, which requires the most attention. The majority asserts that the privilege should not be extended to

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by the content, form and context of a given statement, as revealed by the whole record." *Id.* at 147-48, 103 S.Ct. at 1690. *Connick* involves free speech in the employment context, not defamation. However, Justice White's language in *Connick* was quoted with approval by Justice Powell in *Dun & Bradstreet*, 472 U.S. at 461, 105 S.Ct. at 2946, itself a defamation case. Thus, the Supreme Court has indicated that there may be occasions in the area of defamation law when a court needs to make determinations pursuant to a criterion of the type set forth in this dissent.

reports of foreign governments because those governments are "not necessarily familiar, open, reliable or accountable." Ante at 879. Presumably, the reports issued by those governments are not sufficiently trustworthy, and, therefore, a greater risk of defamation inheres in publishing them. However, that risk alone should not outweigh the public's interest in the dissemination of that information. *See* Note, *supra*, at 1109, 1112, 1115. The majority seems to relate the extent of that risk to the conclusion that the American reading public will assume that the official reports of such unreliable governments are trustworthy. While that assumption may sometimes be well-grounded, it would seem quite likely that many American readers will often tend to discredit whatever a foreign government has to say when that government is perceived in this country as not treating its citizens fairly by American standards. Also, as discussed in Part II *infra,* in a case in which the qualified privilege is otherwise available the requirement of proper attribution will inform the reader of the source of the information.

I agree with the majority that courts in the United States should try to avoid becoming involved in determining whether a given foreign government is open and reliable enough to warrant extending the privilege to the republication of a press release of that government. Such an inquiry could well implicate the credibility of the foreign government and its agencies. *Cf. Webb v. Times Publishing Co., Ltd.*, [1960] 2 Q.B.535,563. If a qualified privilege is recognized and the major criterion for its application depends upon the importance of the publication to the American reader, a court may have to walk a very thin line in order to avoid violating principles of comity. But, in any event, a complete refusal to recognize the privilege will not solve the problem entirely. For if the qualified privilege is held not available as a matter of law or, under the standards suggested by this dissent, is determined not to be applicable in a given case, then, as Judge Ervin has noted, ante at 879, under Virginia law the burden will be on the plaintiff to prove falsity. That will require a given plaintiff not only to engage in pretrial discovery with regard to the issue of falsity, but, if trial is held, will cause that plaintiff to try to prove that the foreign

government's report was false.[2] And, in a jury trial, that inquiry may be more difficult to control than an inquiry made by the court under the standard and procedure discussed in this dissent.

Webb v. Times Publishing Co., Ltd., [1960] 2 Q.B. 535 provides a framework for analyzing the public interest issue. Cynthia Webb, the plaintiff, was the former wife of Brian Hume. In 1950, Hume was tried in a British court for the murder of Stanley Setty. Webb testified on Hume's behalf at the trial, and in the course of so doing she stated that she had never met the murder victim. 1 Q.B. at 537. Hume was subsequently acquitted of the murder charge, although he pleaded guilty to a lesser offense. *Id.* at 538. In 1959, Hume was again put on trial for a different murder, this time in Switzerland. During the Swiss trial, Hume testified that, although he and Webb were married at the time of the first trial and had had a child, the father of that child was actually Stanley Setty, the murder victim involved in the previous case. *Id.* at 537-38. An account of the Swiss trial, including the verbatim testimony concerning the relationship between Setty and Webb, was subsequently published in England by the defendant newspaper. Webb sued for defamation, claiming that a reader of the newspaper's account of the Swiss trial would conclude that she had not only committed adultery with Setty but also had perjured herself at the British trial by testifying that she had never met Setty before. *Id.* at 538-39.

In its defense, the defendant newspaper argued that a blanket common law official report privilege protected its publication of the account of the Swiss trial, but that, in any event, a qualified privilege existed with respect to the particular existed with respect to the particular facts in *Webb*. *Id.* at 553. After reviewing the five justifications commonly given for the privilege, *see id.* at 559-61,[3] Justice Pearson focused upon the need for the

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[2] *See* the discussion on the issue of burden of proof in the majority opinion, ante at 879.

[3] Those reasons are: (1) the fact that court proceedings were open to the public; (2) that the administration of justice concerns all persons; (3) that the public should be educated about how justice is administered; (4) that even defamed persons may "be better off with fair and accurate reports than with

court to engage in a "balancing operation" in which the court "balanc[es] the advantages to the public of the reporting of judicial proceedings against the detriment to individuals of being incidentally defamed." *Id.* at 561. He noted that judicial proceedings in certain countries were not as fair or reliable as those in England, that such proceedings were sometimes subject to propagandist abuse by the governments of some countries, and that those two considerations increased the risk that incidental defamation would occur. *Id.* at 562. Justice Pearson concluded that, in terms of a blanket privilege, the differences between foreign and British judicial proceedings were great enough that the risk of an individual being incidentally defamed outweighed the public benefit resulting from the reporting of that proceeding in England. *Id.* But, continued Justice Pearson, in *some* circumstances the British public interest might well justify the reporting of a foreign judicial proceeding and the application in such a case of the defense of privilege, despite the incidental risk of defamation. *See id.* at 563-65.[4] In such circumstances, it is not the presence or absence of the foreign government's reliability which should control the applicability, *vel non*, of the privilege. *See id.* at 563; *see also* note 5, *supra*. Instead,

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rumours [sic] circulating," and (5) that the balancing of interests justified the extension of the privilege. Concluding that the first four of these reasons had very little force in the context of *foreign* judicial proceedings, *see* 2 Q.B. at 559-61, Justice Pearson emphasized the applicability of the fifth reason.

[4] In so holding, the British court relied on the proposition that the status of the governmental body issuing the report was not conclusive, citing *Perera v. Pieris*, [1949] A.C. 1 (P.C.). *Perera* involved an appeal to the British Privy Council from the then-British colony of Ceylon concerning a report issued by the government of Ceylon. The report was based on testimony taken *in camera* by a government commission investigating an alleged bribery scandal within the Ceylon government, and was reprinted in the Ceylon Daily News. The plaintiff, who had testified in the *in camera* proceedings, was described in the report as "'completely lacking in frankness,'" [1949] A.C. at 17, and subsequently sued the newspaper for libel. The Privy Council noted that a qualified privilege of fair report existed under the applicable Roman-Dutch law, which was quite similar to British law in this area, *id.* at 19-20, and concluded that the Ceylon public had a great interest in the contents set forth in the government's report. *Id.* at 21-22. As in this case, the press release in *Perera* referred to a non-public proceeding.

> [o]ne has to look for a legitimate and proper interest as contrasted with an interest which is due to idle curiosity or a desire for gossip. There is not necessarily anything wrong in newspapers publishing news items which appeal only to idle curiosity or the desire for gossip. But, if they do so, there is not in subject-matter any such legitimate and proper interest as is needed to confer privilege for an incidental defamation that may be involved.
>
> *There is thus a test available for deciding whether the subsect-matter is appropriate for conferring privilege.* A report of the decision of the United States Supreme Court on an important question of commercial law has legitimate and proper interest. On the other hand, a report of a judicial proceeding wholly concerned with an alleged scandalous affair between Mrs. X and Mr. Y is unlikely to have such interest and is likely to appeal only to idle curiousity or a desire for gossip.

Webb, 2 Q.B. at 569-70 (emphasis added). In stating those extremes, Judge Pearson recognized that future cases might well involve subject matter of varying degrees of importance between such extremes. *See id.* at 570.

The majority opinion states that the burden of proving the falsity of the report's content and negligence in its publication, which Virginia law imposes upon a plaintiff, adequately protects media defendants' First Amendment rights. Ante at 879. That may well be an important consideration in certain types of defamation situations. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775-78, 106 S.Ct. 1558, 1563-65, 89 L.Ed.2d 783 (1986). In a given case, both plaintiff and defendant may find it equally difficult to obtain access to the facts necessary to establish the truth or falsity of the information contained in the republished report of a foreign government. But in a case such as this, when the media party is relatively small,[5] it may not have the financial

[5] The following information about the media appellees would appear relevant. The public television station, WNVC-TV, is owned by appellee CVETC. CVETC

or logistical wherewithal to confirm the accuracy of the information in the report.[6] Or, at the very least, it may not be able to do so with the speed necessary to make the publication of the report meaningful to its readership.[7] In the heat of the moment, faced with the prospect of potentially devastating lawsuits on the one hand and the difficulty of confirming a story's accuracy on the other, the media party may not find much comfort in the fact that, if the case goes to trial, the plaintiff may not be able to prove falsity.[8] On balance, media defendants, especially the smaller ones which are targeted to specific audiences, may all too often decide not to publish.[9] As a result, certain segments of the American public--such as the Korean-American public in this case--will be

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is a non-profit, noncommercial public station based in Falls Church, Virginia, with an approximate viewership of less than 19,000 persons. *See* App. 81K, 127. WNVC-TV's multi-language programming serves many ethnic communities in the metropolitan Washington, D.C. area.

By contrast, the newspaper appellees specifically target their publications at the Korean-American public. The Sae Gae Times is a weekly English-language publication printed exclusively in the United States. The remaining appellees, although United States corporations, republish daily Korean language editions of major Korean daily newspapers for circulation in the United States. The Korean Herald is a two-person office and employs no reporters or editors. *See* App. 199. The record does not clearly indicate the size of the other appellees.

[6] The record discloses that at least two of the appellees simply did not have the resources necessary to confirm the accuracy of the press release. *See* App. 200,218. Appellee Sae Gae Times, which comes out weekly, tried to verify the story, but by the time of publication, was only able to contact one of the persons mentioned in the story. *See* App. 274-75. That appellee subsequently did manage to get in touch with appellant and printed appellant's denial of the espionage charges. *See* App. 275.

[7] The publisher of the Korean Times, which also republishes the Hankook Ilbo in the United States, testified during his deposition about the complaints received from the Hankook Ilbo's readership when stories from Korea are not reprinted as quickly as possible. App. 205.

[8] *See* ante at 879.

[9] By the terms of their publishing contracts, several of the appellees seemingly must either reprint verbatim a given edition of the Korean newspaper from which they receive their information, or cannot under the terms of the contract reprint anything at all. *See* App. 197, 205-06, 208-09, 220, 222. If by the terms of

deprived of access to information of great importance to them.[10] Under the circumstances, I conclude that this is the type of case in which a qualified privilege for the fair republication of an official report of a foreign government should exist and be applied, subject only to the reservations stated in Part II of this opinion.

II.

There is a factual dispute as to whether some of the newspaper articles properly attributed the story to the two Korean agencies which issued the press release. To establish their right to rely on the qualified fair report privilege, appellees must establish (1) that the South Korean press release is an official report; (2) that it contains defamatory statements; (3) that the subject matter of the release is of public concern; (4) that an appellee's account of the press release is fair and accurate; and (5) that the media properly attributed the source of the report. *See* Restatement (Second) of Torts §611 (1977).[11]

All but one of these five requirements are met in this case. First, because the press release was issued by two agencies of the

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those contracts appellees may not eliminate articles the accuracy of which they cannot confirm, a choice not to reprint an official governmental report may of necessary prevent the republication of other nondefamatory information as well.

[10] Indeed, the record reflects that this was the express opinion of at least two of the appellees. *See* App. 264, 294. Furthermore, the story seemingly was of special interest to those persons with connections to Western Illinois University, where appellant wa a student during the time the espionage ring was allegedly active.

[11] While the Restatement, as well as some cases, *see, e.g., Lavin v. New York News, Inc.*, 757 F.2d 1416 1420 (3d Cir. 1985), perhaps fuse together the separate requirements of accurate reporting and proper attribution, or apply balancing considerations, other cases suggest that each of these two requirements may stand on its own feet and be independent of the other, and that a defendant claiming the privilege must prevail separately as to each requirement. *See Dameron*, 779 F.2d at 739; *see also, e.g., Curtis Publishing Co. v. Vaughan*, 278 F.2d 23, 28-29 (D.C. Cir.), *cert. denied*, 364 U.S. 822, 81 S.Ct. 57, 5 L.Ed.2d 51 (1960); *Hughes v. Washington Daily News Co.*, 193 F.2d 922, 923 (D.C. Cir. 1952) (citing state cases and terming issue "well-settled"). The latter view would appear preferable in the context of this case when one keeps in mind the closeness of the underlying issues involved.

South Korean government, it appears clear that the press release is an official report. *See Medico*, 643 F.2d at 139-40; *Hughes v. Washington Daily News Co.*, 193 F.2d 922, 923 (D.C. Cir. 1952). Second, none of the parties appears to deny that the allegations contained in the release would be defamatory if proved at trial to be false. Third, for the reasons discussed by the majority and in Part I of this dissent, and as recognized by the district court, the subject matter of the report is of public concern. Fourth, appellant conceded in the district court that the various appellees' accounts of the press release's contents constitute impartial and accurate summaries of the press release. App. 54-55, 61, 62; *see Mills v. Kingsport-Times News*, 475 F. Supp. 1005, 1011 (W.D. Va. 1979) (describing requirement of accurate summary under Virginia law). There is, however, an open issue, one apparently not specifically addressed by the district court; whether, with respect to each article, each of the appellees properly attributed the report to the Korean governmental agencies which issued it.

The issue of fair attribution is generally a question for the fact-finder; in the case at bar, that would be the jury, as plaintiff has prayed a jury trial. *See Lavin v. New York News, Inc.*, 757 F.2d 1416, 1420 (3d Cir. 1985). The attribution requirement is not met, and therefore the privilege will not attach, if

> the report is written in such a manner that the average reader would be unlikely to understand the article (or the pertinent section thereof) to be a report on or summary of an official document or proceeding. *It must be apparent either from specific attribution or from the overall context* that the article is quoting, paraphrasing, or otherwise drawing upon official documents or proceedings.

Dameron, 779 F.2d at 739 (emphasis added).

The attribution requirement is especially important in the context of the republication of the official reports of *foreign* governments because the proper attribution of such a report will tend to decrease the risk of incidental defamation. As Judge Mikva noted in *Dameron:*

> [If there is no proper attribution,] the reader is left with the impression that the conclusion is that of the article's author based on his own research--which may or may not have included government reports. *Had the author attributed the report to its source, the reader would know that he was simply being informed of the [government agency's] view and could then evaluate the statement accordingly. The defamatory potential of an unattributed statement of what is apparently an accepted fact presents a far different situation.*

779 F.2d at 740 (emphasis added).

The record discloses that appropriate attribution is present with respect to the CVETC news broadcast and the articles published by the Korea Herald and the Sae Gae Times.[12] As for the news stories carried by the Dong-A Ilbo, the Hankook Ilbo, the Joong-Ang Ilbo, the Cho-Sun Ilbo, and the Korea Times, the appellees appear to admit that these articles contained no *specific* attribution. *See* Appellees' Br. at 27. Accordingly, whether or not attribution is revealed by the overall context of the articles in ques-

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[12] The CVETC broadcast was given by an employee of the Korean Broadcasting System, the state-sponsored television station in South Korea. In the course of summarizing the press release, the announcer specifically referred to the National Security and Planning Agency and the Military Security Command by name, and stated that these agencies had issued a "special announcement" about the student spy ring and had "released" information pertaining to the incident. See App. 182-83 (translation of broadcast).

The Korean Herald, which prints its stories in English, published two related articles as well as an editorial. The articles, the basis for appellant's claim against this appellee, were on the same page and are clearly related. *See* App. 79-80. One of the articles begins: "The Agency for National Security Planning (NSP) and the [Military] Security Command Monday announced a crackdown .... The announcement said ...." The other article had a headnote beginning: "Following are summaries of activities by key members of the two espionage rings cracked down on by the [Korean government agencies]." *See* id.

Similarly, the Sae Gae Times published a synopsis of the press release as well as several related articles. The articles' source is specifically labelled as a "Release by the National Security Planning Agency and the [Military] Security Command of Korea." App. 252.

tion, *see Dameron*, 779 F.2d at 739, is a factual issue which not only has not been addressed by the district court but cannot, in any event, be determined by this court in the light of the record before us. Therefore remand to the district court for further proceedings as to the question of attribution concerning these four appellees[13] would be needed *if* the qualified privilege approach set forth in Part I of this dissent were subscribed to--as it is not--by the majority.[14]

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[13] There are four rather than five appellees because the Korea Times is responsible for both its own publication and that of the Hankook Ilbo. *See* note 7, *supra*.

[14] If there were such a remand and, if on remand, it were determined, either by the district court on a motion for summary judgment or by the jury at trial, that the remaining four appellees properly attributed the source of their articles, then the privilege would shield these four appellees from liability and would entitle them to judgment. That result would follow because, as the majority opinion states. "To overcome the [official report] privilege, a plaintiff must show malice." Ante at 877. In this case, appellant does not contend that appellees have acted with the common law malice necessary to destroy the privilege under Virginia law. *See Gazette, Inc. v. Harris*, 229 Va. 1, 325 S.E.2d 713, 727 (1985), *cert. denied sub nom. Fleming v. Moore*, 472 U.S. 1032, 105 S.Ct. 3513, 87 L.Ed.2d 843 (1985) *and Port Packet Corp. v. Lewis*, 473 U.S. 905, 105 S.Ct. 3528, 87 L.Ed.2d 653 (1985).

APPENDIX B

Order of the Court of Appeals Denying
Motions For Rehearing And Suggestions
For Rehearing En Banc.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-2578

FILED OCT 14 1988 U.S. Court of Appeals Fourth Circuit

Chang-Sin Lee,

Plaintiff-Appellant,

v.

The Dong-A Ilbo, et al,

Defendants-Appellees.

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellees' petitions for rehearing and suggestions for rehearing in banc and appellant's answer to the petitions were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestions for rehearing in banc, and

As the panel considered the petitions for rehearing and is of the opinion that they should be denied,

IT IS ORDERED that the petitions for rehearing and suggestions for rehearing in banc are denied.

Entered at the direction of Judge Ervin, with the concurrence of Judge Murnaghan and Judge Kaufman, United States District Judge sitting by designation.

For the Court

/s/ _____

JOHN M. GREACEN
CLERK

APPENDIX C

Memorandum Opinion of the United States District Court For The Eastern District of Virginia, April 16, 1986.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

CHANG-SIN LEE,)
Plaintiff)

v.)

THE DONG-A ILBO, et al.,)
Defendants)

CIVIL ACTION NO. 86-0958-A

MEMORANDUM OPINION
IN SUPPORT OF ORDER OF MARCH 23, 1987

This case came before the Court on defendants'[1] F.R. Civ. P. 56 motions for summary judgment.

The plaintiff filed a second amended complaint alleging that in September, 1985, defendants, The Dong-A Ilbo, Joong-Ang Ilbo Daily News, Inc., The Korea Herald, Korea Times, Cho-Sun Ilbo, and Sae Gae Times published and circulated articles in the metropolitan Washington, D.C. area on an alleged student-run North Korean espionage ring in the United States. That on September 12, 1985, WNVC-TV, owned by defendant, Central Virginia Educational Television Corporation, broadcast a report about the same news story in the same area. All defendants' articles or broadcast included a chart of individuals named as members of the espionage ring residing in the United States. Plaintiff (Chang-Sin Lee) alleges that the name (Lee Chang-Sin), inserted in one of the three boxes placed at the highest level of this chart, identified plaintiff in Korean[2] as "North Korean Agent in the U.S."

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[1] The three motions for summary judgment consisted of one by each of the following defendants: Sae Gae Shinbo, Inc., the other five newspapers jointly, and Central Virginia Educational Television Corporation (CVETC).

[2] Defendant, The Korea Herald, published its article in English.

and as an "Ex-employee of the Overseas Korean Journal." Because defendants' publications and broadcast have allegedly injured plaintiff's reputation, he brought this action in libel seeking damages for certain defamatory statements made by defendants.

Plaintiff, Chang-Sin Lee, is a resident of New York. Defendants, The Dong-A Ilbo, Korea Times, Joong-Ang Ilbo, Cho-Sun, The Sae Gae Shinbo, The Korea Herald, and Central Virginia Educational Television Corporation (WNVC-TV), are Virginia domiciliaries. This Court has jurisdiction pursuant to 28 U.S.C. §1332.

Defendants contend that each article published and/or broadcast by them was an accurate account of a September 9, 1985, Press Release (KBS news report) issued by the Korean National Security and Planning Agency ("NSPA") and the Korean Military Security Command ("MSC"), both intelligence agencies of the South Korean Government. Defendants assert that the "fair report" privilege, also referred to as the "official report" or "record privilege", should apply to all foreign government official reports.

Plaintiff argues that the "fair report" privilege should never be extended to republications of foreign government official reports. Plaintiff contends as well that there is no public policy to be served by the dissemination of "official records" of foreign governments that may involve defamation.

The common law "record privilege" has long protected republication of defamatory statements stemming from governmental proceedings. *Medico v. Time, Inc.*, 643 F.2d 134, 137 (3rd Cir.), *cert. denied*, 454 U.S. 836 (1981); *see also* Comment, *Constitutional Privilege to Republish Defamation*, 77 Colum. L. Rev. 1266, 1268-69 (1977).

The "fair report" privilege embedded in the common law of libel is set out in the Restatement (Second) of Torts §611 (1977) as follows:

> (t)he publication of defamatory matter concerning another in a report of an official action or proceeding

> ... is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

Id.

One court acknowledged that "(s)ection 611 of the Restatement of Torts definitely expresses the prevailing, if not unanimous, weight of judicial authority." *Lulay v. Peoria Journal-Star, Inc.*, 34 Ill. 2d 112, 115,214 N.E.2d 746, 748 (1966). The *Medico* court asserted also that there is an uprising trend towards recognition of a "constitutional privilege of fair report." *Medico, supra* at 143.[3]

This privilege "extends to the report of *any official proceeding*, or any action taken by any other officer of the government of the United States, *or if any State* or any of its subdivisions." *Id.* at comment (d) (emphasis added). The comments to §611 stress that "(t)he filing of a report by an officer or agency of the government is an action bringing *a reporting of the governmental report* within the scope of the privilege." *Id.* (Emphasis added).

This privilege and/or conditional immunity applies to fair and accurate publications of *official proceedings* is an exception to the common law rule that one who repeats or republishes a defamation stated by another 'adopts' it as his own. *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 739 (D.D.C. 1985). (Emphasis added).

The Virginia Supreme Court has ruled that a fair and substantially correct publication of a public record is privileged, that the inaccuracy of the record does not necessarily destroy the privilege, and that its status is not altered by the falsity of the statement in the record. *Alexandria Gazette Corp. v. West,* 198 Va. 154, 159-60, 93 S.E.2d 274, 279 (1956); *see also, Williams v. WCAU-TV*, 555 F. Supp. 198, 202 (E.D. Pa. 1983); *Sciandra v. Lynett,* 409 Pa. 595, 599, 187 A.2d 586, 589 (1963); Restatement (Second) of Torts

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[3] *See generally* Note, *The Developing Privilege of Neutral Reportage,* 69 Va. L. Rev. 853 (1983); Comment, *Protecting the Public Debate: A Proposed Constitutional Privilege of Accurate Republication,* 58 Tex. L. Rev. 623 (1980); Barnett, *The Privilege of Defamation By Private Report of Public Official Proceedings,* 31 Ore. L. Rev. 185 (1952).

§611, Comment (f). Although verbatim accounts are unnecessary, the article must not depart substantially from the public record. *Mills v. Kingsport Times-News*, 475 F. Supp. 1005, 1011 (W.D. Va. 1979). In this case neither the plaintiff nor defendants dispute the accuracy of defendants' news report and/or broadcast.

Virginia requires proof of common law malice, not mere negligence, to defeat a qualified privilege. *The Gazette v. Harris*, 229 Va. 1, 18, 325 S.E.2d 713, 727, *cert. denied*, ___ U.S. ___, 105 S.Ct. 3513 (1985). In defamation actions, once the defendants have shown the existence of a "fair report" privilege, as they have done here, the burden shifts back to the plaintiff to demonstrate actual malice by the defendant toward the plaintiff. *Id.; see also, Sciandra v. Lynett, supra* 409 Pa. at 599, 187 A.2d at 589. At the summary judgment stage in defamation actions, the United States Supreme Court now necessitates a showing of malice by clear and convincing preliminary evidence. *Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___, 91 L.Ed.2d 202 (1986).

Plaintiff fails to meet the heavy burden that defendants republished and/or rebroadcast the South Korean Press Release inaccurately or with malice toward the plaintiff. Plaintiff is unable to show that anyone attributed the news story to him or show that he is the individual referred to in the complained or article and/or broadcast. He has not produced evidence of any malice of either defendant towards him or reckless or wanton disregard of either defendant for the truth of the published and/or broadcast news story. The plaintiff argues that the privilege has never been extended and should never extend to publications of foreign official reports.

Since Virginia law is unquestionably as protective as §611 of the Restatement (Second) of Torts' blanket privilege to reports of government actions, there is little doubt that if "the spy story" had been released in the United States by a federal or state agency it would have been privileged. Section 611 and the official proceedings common law exception, as explained in *Dameron, supra,* should be given blanket application to a foreign government's actions for reasons given below.

Because of the United States' substantial involvement in international trade, markets, governments, security, etc., this 'fair report' privilege should be construed as having a broad scope as to the American press' and television's republication and/or rebroadcasting of foreign official news releases and/or proceedings.

The *Medico* court, *supra*, stressed that one of the crucial policies underlying §611 is the public's right to be informed on significant matters, such as alleged organized criminal networks. *Medico, supra,* at 142. "(I)t is in the public interest that information be made available as to what takes place in public affairs, (so) a newspaper has the privilege to report the acts of the executive or administrative officials of government." *Sciandra, supra* 409 Pa. at 600, 187 A.2d at 587-88. "The basis of the privilege is the interest of the public in having information made available to it as to what occurs in *official proceedings* and public meetings." *Bufalino v. Associated Press,* 692 F.2d 266, 271 (2d Cir. 1982), *cert. denied,* 462 U.S. 111, 103 S.Ct. 2463, 77 L.Ed.2d 1340 (1983) (quoting Restatement (Second) of Torts §611 comment (a)). (Emphasis added).

While there appears to be no reported cases dealing with this issue, the English Courts have addressed the issue on at least one occasion. In *Webb v. Times Publishing Co., Ltd.,* 2 All Eng. 789 (1960), defendant newspaper had published a report of British subject Hume's trial in Switzerland. The publication stated that Hume had admitted to murdering a Swiss citizen and to killing Stanley Setty in England because of jealousy. According to the report, when Hume was asked if he was married and had a child, he replied that he was but the father of the child was Stanley Setty. Plaintiff's action alleged that this meant that she had committed adultery with Setty and had given perjured evidence at a prior trial of Hume in England when she had denied ever having met Setty. Defendants contended that the qualified privilege attached to the report as a fair and accurate report of foreign judicial proceedings. The *Webb* court held that because the subject matter of defendants' report was connected with the administration of jus-

tice in England, it was of legitimate and proper interest to English newspaper readers and was protected by a qualified privilege.

The privilege should encompass republication of foreign as well as domestic affairs. This privilege is one for the public's need to know what is happening in this country and in other nations, particularly where a news story has a significant nexus, as in this case, between persons located in the United States and involved with foreign governments. Here the subject matter of the news release by the Korean government was related to the security interest of the United States. "The spy story"'s associating many of the student spies to Western Illinois University would be of public concern. Since the Korean government's news release was of legitimate and proper interest to the American public and the large Korean American community in particular, republication and/or rebroadcast of the news story should be protected by a qualified privilege. The need to know official actions and investigations by the South Korean government that affect the United States may be as great as government releases and actions of the United States government.

The plaintiff contends the privilege should not extend to foreign governments because those governments may not be as reliable as our own government in ascertaining the truth prior to making a release and may even engage in deception in their releases. However, the privilege assumes that government releases are based on official records and actions and they contain a degree of reliability over and above what might be stated or released by an individual. An official release by a foreign government also contains that higher degree of reliability. While other governments may not possess the democratic form of government and commitment to informing its citizens in the same forthright manner as ours, it would not seem prudent to deny the privilege to their releases. With the tremendous advances in transportation, communications and trade our daily contacts around the world become more important. News from countries around the world increasingly affects our national security, trade, price of the dollar, interest rates, and etc.

I find that the rationale and policy ramifications of the "fair report" privilege, set out in *Dameron, Medico,* and other cases, pertain equally to the official pronouncements of foreign governments as to pronouncements of government entities in the United States. The privilege safeguards interests analogous to those guaranteed by the First Amendment, the right of persons anywhere in the United States to be informed of what governments in this nation and throughout the world are doing. The public has a right to be informed on important official government matters and the press must be allowed to publish or broadcast accounts of official government proceedings or reports.

An appropriate order shall issue.

/s/ _____
Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
Date: Apr. 16, 1986

APPENDIX D

Translation of Korean Language Broadcast
Aired by WNVC-TV on September 15, 1985.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

CHANG-SIN LEE,)
Plaintiff,)

v.)

THE DONG-A ILBO, et al.,)
Defendants)

CIVIL ACTION NO. 86-0958-A

AFFIDAVIT OF CHANG H. LEE

I, Chang H. Lee, having been placed under oath, state that the following facts are true to the best of my knowledge, information and belief:

1. I am a citizen of the Republic of Korea, and was formerly employed by the Government of the Republic and Korea in its foreign ministry and diplomatic corps. I held the position of third undersecretary in the Republic of Korea's embassy in Washington, D.C. during the years 1965 to 1966.

2. I have been approved by the United States Department of State as one of the few simultaneous Korean language - English language translators and interpreters in the Washington, D.C. metropolitan area, and I am fluent in both Korean and English.

3. I have viewed a videotape of a news program aired by WNVC-TV on September 15, 1985, and I have prepared a literal, word-for-word translation of its contents, together with a literal, word-for-word translation of Korean characters in a box containing the new "Lee Chang Shin" shown on charts televised during this news report. The news report was originally broadcast by

Korean Broadcasting System, which is the state-controlled television station located in Seoul, Republic of Korea.

4. The attached English language translations are accurate and complete translations of the entire news program and the contents of the box containing the name "Lee Chang Shin" shown on two televised charts. These charts were televised for approximately 11 seconds. I have indicated on "Chart 1" and "Chart 2", attached hereto, where the box containing the name "Lee Chang Shin" appears on each chart. No other legible information is contained in the boxes. Chart 1 was televised first, and Chart 2 was televised next. The two charts did not appear on the screen at the same time.

5. I am familiar with the format of press releases issued by agencies of the Government of the Republic of Korea.

6. The document attached as Exhibit 1 to CVETC's pretrial list of exhibits states in Korean characters at the top of the first page of the document that it is a "Press Release". The Press Release also contains the following caption: "A series of incidents of Activist Students Involving North Korea's operations in South Korea -- School infiltration By Overseas Korean Student Agents" -- followed by the date September 9, 1985. At the bottom of the page, in Korean characters, the name "National Security and Planning Agency" and "Military Security Command" appear.

On the second page, entitled "Table of Contents", the Press Release states that one of its attachments is an organizational chart of alleged student spies in the United States. This information is contained in the last characters on the bottom line of the "Table of Contents".

The chart attached to the Press Release contains a circle with the following information about the "Lee Chang Shin" mentioned:

(a) Agent in the U.S.A.
(b) Lee Chang Shin 30
(c) Former employer of the Korean Overseas Journal.

Next to this circle is a box containing the following information about "Lee Chang Shin":

(a) Emigrated to U.S.A. in 1975.
(b) Contacted by Suh Chung Kyun and acted as a lower eschelon agent in U.S.A.
(c) Conveyed to Dong Hwa Yang North Korean books through Pong Shim Cho and In Sook Rha.

7. The Press Release, attached as Exhibit 1 to CVETC's Pretrial List of Exhibits, is in a format typical to that used by agencies of the Government of the Republic of Korea in making official announcements to the press.

/s/ _____
Chang H. Lee

DISTRICT OF COLUMBIA:

SUBSCRIBED and SWORN before me on February 26, 1987.

/s/ _____
Notary Public

My commission expires: [My Commission Expires August 31, 1991]

Translation of Korean Language KBS News on September 15, 1985 via WNVC

Two groups of school infiltration agents of Korean overseas students, consisting of 22 persons, were arrested. This verifies the fact that the North Korean puppet regime has been intensifying its strategy to instigate communist revolution through domestic confusion, employing leftist movement students in our schools as front activitists for operations in South Korea.

First of all, correspondent Hyuk Bo Kwon will have the report about the entire picture of this incident.

National Security and Planning Agency and Military Security Command arrested an entire web of overseas student agents, organized in two groups: Korean student agents in the United States and in West Germany. The total number of 22 persons were arrested. 19 of them were charged with violations of the National Security Law and 3 were charged without detention in consideration for their voluntary submission to the authorities.

The key figures of the school infiltration by the Korean students in the United States are Sung Man Kim, 28, Yonsei University graduate, and Dong Wha Yang, 27, drop-out of Chosun University. They went for overseas study in 1982 and were contacted by Joon Koon Suh, publisher of an anti-Korea newspaper. They received secret education in Pyungyang and Hungary, entered Korea, and were arrested while conducting underground activities around Kwangju and Seoul.

And the members of the Korean student agents in West Germany are Jin Sook Lee and Sang Keun Ahn, who were arrested while conducting spy activities in school campuses in Taegu area.

National Security and Planning Agency disclosed that Dong Wha Yang and Sung Man Kim of the Korean student agent group in the United States had been instructed from North Korea to come to Korea to contact activist students. They published and distributed an anti-American booklet, Submission and Cry, and a manual for revolution in South Korea, Main Directions of Revolution. They also contacted the extreme activist students at Chun-

nam University upon instructions from North Korea to explode the United States Information Service office in Kwangju and to attack the R.O.T.C. arsenal of Chosun University. They contacted 17 students and were in the process of implementing these instructions when they were arrested.

And the West German student agent Jin Sook Lee entered Korea upon North Korean instructions, got a job as assistant professor at a certain college in Daegu, thereby securing a base for school infiltration, and contacted Sang Keun Ahn, resident chief editor in Korea for an anti-Korean newspaper in West Germany who had returned to Korea. She was arrested while controlling the student disturbances behind the scene in Daegu area.

National Security and Planning Agency and Military Security Command made a special announcement that the overseas student agent groups had arranged jobs for the contacted college students as disguised workers to agitate anti-government and anti-American fights. They had also emphasized domestic turmoil through labor movement.

It was also announced that, in order to elate the degree of favorable student response, they used such disguised words as people instead of proletariats used by North Korea and people's liberation instead of socialist revolution, and planned revolutionary destruction and anti-American violent activities in organized scheme disguising student demonstrations as democratization movement.

Investigation authorities also released that a total of 743 items had been confiscated as evidence, including such 623 ill-intended books as Main Directions of Revolution, a North Korean manual for revolution in South Korea, printing machines used in publication of ill-intended printed materials. It was also released that they had spent money equivalent to 25 million won, including US $26,000.00 to finance their operations.

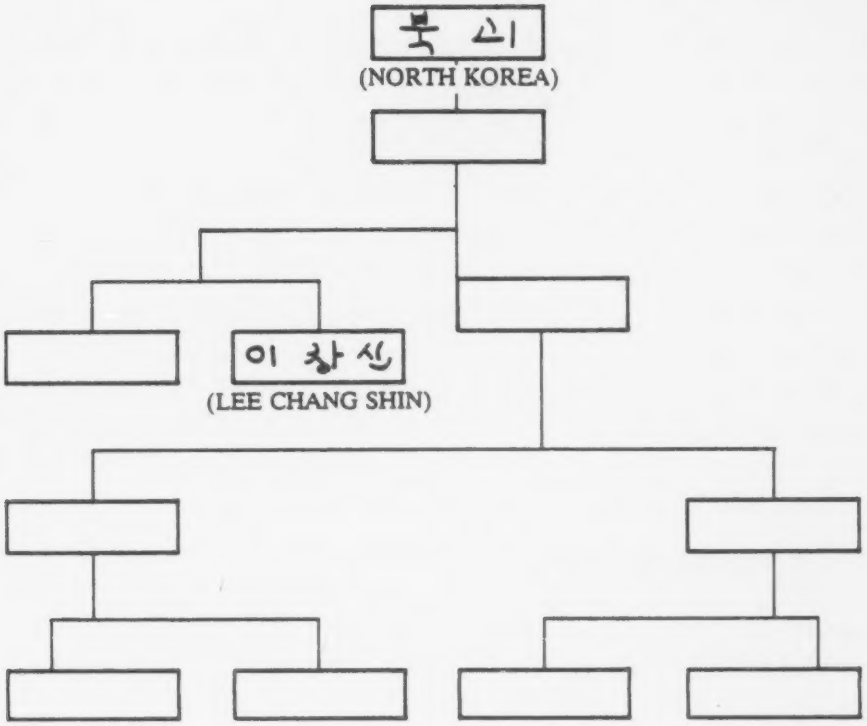

CHART 1

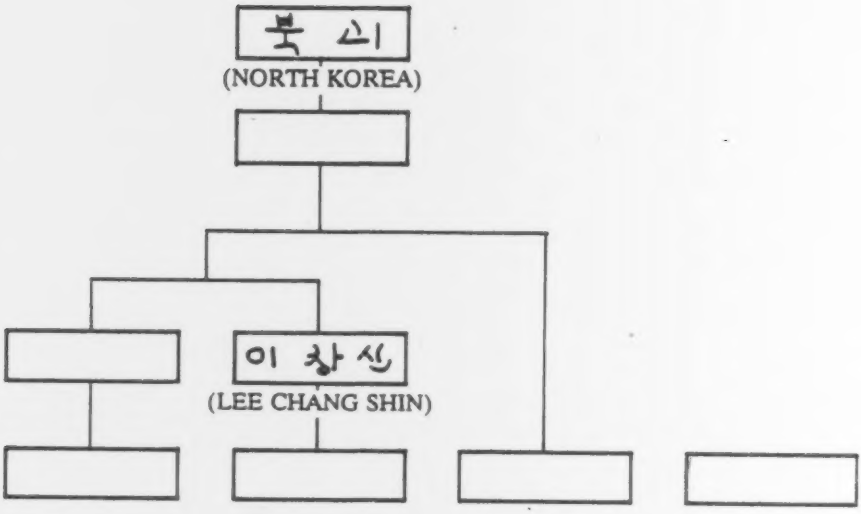

CHART 2

Supreme Court, U.S.
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No. 88-1163 (2)

In The

Supreme Court of the United States

October Term, 1988

CENTRAL VIRGINIA EDUCATIONAL TELEVISION CORPORATION,

Petitioner,

v.

CHANG-SIN LEE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S SUGGESTION OF MOOTNESS

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No. 88-1163

In The

Supreme Court of the United States

October Term, 1988

CENTRAL VIRGINIA EDUCATIONAL TELEVISION CORPORATION,

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S SUGGESTION OF MOOTNESS

Respondent, Chang-Sin Lee, respectfully requests that the petition for writ of certiorari submitted by Petitioner Central Virginia Educational Television Corporation ("CVETC") be dismissed on the grounds that there no longer is an active case or controversy with respect to CVETC and, therefore, its petition is moot.

CONSTITUTIONAL PROVISION INVOLVED

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . [and] to Controversies . . . . U.S. CONST. art. III, § 2.

STATEMENT OF FACTS

In September 1985, certain Korean media published and broadcast news reports that announced the breakup of two North Korean espionage rings in the United States and West Germany. WNVC-TV, a Virginia television station wholly owned by Petitioner CVETC, and certain newspapers republished and rebroadcast the story in the United States after it was reported by the Korean media. WNVC-TV's broadcast of the news report included the depiction of two organizational charts identifying Chang-Sin Lee as part of the North Korean spy ring in the United States.

The television broadcast and other news accounts published in the United States identified Respondent Chang-Sin Lee, a South Korean citizen living in the United States, as a North Korean agent. Respondent Lee and members of his family immigrated to the United States from the Republic of Korea in October 1975. Mr. Lee graduated from Western Illinois University in 1984. He has been lawfully admitted as a permanent resident alien in the United States and currently is a United States citizen.

PROCEEDINGS IN THE LOWER COURTS

Mr. Lee filed his complaint for an action in libel in the United States District Court for the Eastern District of Virginia after Petitioner and others republished news accounts of the spy story in Korean-American communities in the United States. The district court granted summary judgment for Petitioner and the other defendants, extending to reports or acts of foreign governments the protection accorded by the official reports exception to the general rule of republication liability. On appeal, a panel of the United States Court of Appeals for the Fourth Circuit reversed and remanded the district court's decision. Petitioner sought a rehearing at the United States Court of Appeals for the Fourth Circuit, and suggested rehearing en banc. The petition for rehearing was denied on October 14, 1988. On December 3, 1988, the district court set trial for January 31, 1989.

Petitioner moved the United States Court of Appeals for the Fourth Circuit to stay the mandate on December 22, 1988. The Court of Appeals denied the motion to stay the mandate. On January 12, 1988, CVETC filed its petition for writ of certiorari in the Supreme Court of the United States.

The action proceeded to trial before a jury on January 31, 1989 in the United States District Court for the Eastern District of Virginia. At the close of Respondent's evidence in his case in chief, Petitioner CVETC moved the district court for a directed verdict. The district court granted Petitioner CVETC's motion, and dismissed the action against it. After careful consideration of the district court's ruling, Respondent has decided not to appeal the district court's decision granting Petitioner's motion for a

directed verdict and dismissing the case against CVETC. (An excerpt of the civil docket sheet reflecting the dispositive action in the case against CVETC is included herein as Appendix A.)

CVETC'S PETITION SHOULD BE DISMISSED AS MOOT

It is well settled that the Supreme Court of the United States may adjudicate only actual, ongoing cases or controversies, pursuant to the requirement of Article III, § 1 *et seq.* of the United States Constitution. *Honig v. Doe*, ___ U.S. ___, 108 S. Ct. 592, 601 (1988), *citing Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546 (1976); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). The Court in *Honig* held:

> [t]hat the dispute between the parties was very much alive when suit was filed, or at the time the Court of Appeals rendered its judgment, cannot substitute for the actual case or controversy that an exercise of this Court's jurisdiction requires.

Id. citing Steffel v. Thompson, 415 U.S. 452, 459 n.10 (1974); *Roe v. Wade*, 410 U.S. 113, 125 (1973). *See also Deakins v. Monaghan*, ___ U.S. ___, 108 S. Ct. 523, 528 (1988) ("Article III of the Constitution limits federal courts to an adjudication of actual, ongoing controversies between litigants."); *Hodel v. Irving*, 107 S. Ct. 2076, 2080 (1987) (" . . . the existence of a case or controversy is a jurisdictional prerequisite to the federal court's deliberations.").

Federal courts are not empowered to determine or decide moot cases. *See, e.g., United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920) (" . . . it is a settled principle in

this court that it will determine only actual matters in controversy essential to the decision of the particular case before it."); *California v. San Pablo and Tulare Railroad Co.*, 149 U.S. 308, 314 (1893) ("[t]he duty of . . . every judicial tribunal is limited to determining rights of persons or property which are actually controverted in the particular case before it."). Courts uniformly have followed the principle that "[f]ederal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies." *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70 (1983), *on remand*, 722 F.2d 213 (1984), *citing DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974).

The matters raised in CVETC's petition in the United States Supreme Court are moot because there is no case or controversy between Petitioner and Respondent. When the district court granted Petitioner's motion for a directed verdict and dismissed the action against it, the court effectively terminated the case and extinguished the existing controversy between the two litigants. Respondent's decision not to appeal the dismissal of the case against CVETC firmly establishes that he is not entitled to any relief from Petitioner in this action. No resolution of the issue presented in CVETC's petition can redress Respondent's asserted grievance. *See Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70 (1983).

Absent an appeal, which Respondent declines to bring, there can be no favorable judicial decision that would entitle Respondent to relief against Petitioner. As to CVETC, there no longer is any active or live case or controversy. *See, e.g., Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). Any matter

that CVETC has raised now is moot. Accordingly, because there is no case or controversy with CVETC and because the Court lacks jurisdiction to decide moot cases, CVETC's petition should be dismissed.

Respectfully submitted,

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February 10, 1989

APPENDIX A

Excerpt of docket sheet (Docket No. 86-958-A) reflecting district court's granting of CVETC's motion for directed verdict

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 86-958-A
LEE, Chang-Sin	The Dong-A Ilbo	PAGE___OF___ PAGES

DATE	NR	PROCEEDINGS
1988		
Dec. 2		TRIAL PROCEEDINGS: (AVB) This matter comes on for setting of trial date. Appearances: of counsel. Trial date 1-31-89 with jury
1989		
Jan. 24		JURY instuctions – filed by deft. Sae Gae Shimbo, Inc. bm
Jan. 24		JURY instructions – filed by pltf. bm
Jan. 24		JURY Instructions – filed by deft. Central VA Educational Television Corp. bm
Jan. 25		REQUEST for submission to jury of special verdict form – filed by deft. Central VA Educ. Television Corp. bm
Jan. 25		JURY instructions – filed by defts. Dong-A Ilbo, The Chosun Ilbo America, Inc., Joong-Ang Ilbo Daily News, The Korea Herald and The Korea Times. bm
Jan. 26		DESIGNATION of depositions to be used at trial – filed by deft. Central VA Educ. Telev. Corp. bm
Jan. 27		REQUEST for submission to jury of special verdict form – filed by deft. Sae Gae Shimbo. bm
Jan. 27		OBJECTIONS to pltf.'s jury instructions – filed by deft. Sae Gae Shimbo. bm

Jan. 27	OBJECTIONS to pltf.'s proposed jury charge – filed by deft. Central VA Educational Television. bm
Jan. 27	OBJECTIONS to defts.' proposed jury instructions and special verdict form – filed by pltf. bm
Jan. 30	OBJECTIONS to plts.'s deposition designations – filed by deft. Central VA Educ. Television. bm
Jan. 30	MOTION in limine – filed by deft. Central VA Educ. Television. bm
Jan. 30	AMENDMENT to pretrial list of exhibits – filed by deft. Central VA Educ. Television. bm
Jan. 30	LIST of trial exhibits – filed by deft. Central VA Educ. Television. bm
Jan. 30	DESIGNATIONS OF DEPOSITIONS for use at trial and objections to defts' proposed designations – filed by pltf. rws
Jan. 31	TRIAL PROCEEDINGS: Hilton, j. Linnell, r. Matter came on for trial by Jury. Appearances of parties and counsel. Jury appeared as summoned and sworn on voir dire. The following jurors were sworn to try the issue: George Kirlin, Rosann Reed, Oscar Jensen, Rosana Nichols, Vera Miller, Susan Natale. Witnesses excluded. Opening statements were made. Motion by deft WNVC-TV for s/j – taken under advisement at this time. Pltf adduced evidence. Renewed motion by deft WNVC-TV for s/j – continued under advisement at this time. Court excused jury and adjourned to return 2/1/89 @ 10:00 a.m. rws
Feb. 01	TRIAL BRIEF – filed in Open Court by CVETC. rws

Feb. 01 TRIAL PROCEEDINGS: Hilton, j. Linnell, r. Matter came on for further trial by Jury. Appearances as before. Pltf continued to adduce evidence. Korean Interpreter used. Pltf rested. In the absence of the Jury, CVETC moved for directed verdict – arguments heard and motion granted. Motion for directed verdict on behalf of deft newspapers – argued and denied. Punitive damage issue taken under advisement. Defts adduced evidence and rested. In the absence of the Jury, defts renewed motion to strike punitive damage claim – taken under advmisement [sic]. Court reviewed instruction with counsel. Punitive damages – struck from case. Closing arguments heard. Jury excused and Court adjourned to return 2/2/89 @ 10:00 at which time Court will instruct the Jury. rws

Feb. 02 TRIAL PROCEEDINGS: Hilton, j. Linnell, r. Matter came on for further trial by Jury. Appearances as previous. Court ruled against using the submitted special verdict form. Court instructed the jury. The jury retired to commence deliberations. The Jury returned with a verdict in favor of the Pltf against each deft and award damages in the sum of $15,000 as to each deft. Signed by the foreperson, George B. Kirlin, dated Feb. 2, 1989. There being no desire to have the Jury polled, Jury excused. Court adjourned. The Clerk shall enter judgment in accordance with the Jury Verdict. rws

Feb. 02 JURY VERDICT – filed in Open Court. rws

Feb. 02 JUDGMENT, in accordance with the Jury Verdict, entered and filed by the Clerk. Certified copies to counsel and OB. rws

Feb. 02	STATEMENT OF QUALIFICATIONS of Chang Ho Lee – filed in Open Court on 1/31/89. rws
Feb. 02	PROPOSED VOIR DIRE – filed in Open Court on 1/31/89 by pltf. rws

(3)

Supreme Court, U.S.
FILED
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No. 88-1163

In the Supreme Court of the United States

OCTOBER TERM, 1988

CENTRAL VIRGINIA EDUCATIONAL TELEVISION CORPORATION,
Petitioner,

vs.

CHANG-SIN LEE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

BRIEF OF AMICUS CURIAE UNIVISION HOLDINGS, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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No. 88-1163

In the Supreme Court of the United States

OCTOBER TERM, 1988

CENTRAL VIRGINIA EDUCATIONAL TELEVISION CORPORATION,[1]
Petitioner,

vs.

CHANG-SIN LEE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

BRIEF OF AMICUS CURIAE UNIVISION HOLDINGS, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF UNIVISION

Univision Holdings, Inc. ("Univision") produces and broadcasts Spanish language television programming that reaches approximately 85 percent of the Spanish speaking population in the United States. One subsidiary, Univision Station Group, Inc. ("the Station Group"), owns

1. Two petitions for certiorari were filed from the Fourth Circuit's opinion below, a petition by Central Virginia Educational Television Corporation, Docket No. 88-1163, and a petition by the newspaper defendants, Docket No. 88-1145. Univision requests that its *amicus curiae* brief be considered with both petitions, and Univision has obtained the consent of all parties in both petitions to the filing of this brief.

and operates 14 television stations (eight high power and six low power) that broadcast Spanish language programs in the major Hispanic population centers in the United States. Another subsidiary, Univision, Inc. ("the Network"), is the largest Spanish language television network in the United States, and produces or purchases Spanish language television programming for sale to Univision's own stations and to over 450 affiliated stations.

Hispanics currently make up approximately 10% of the U.S. population—about 20 million people—and Hispanics are the fastest growing minority in the country. By the year 2010 Hispanics will be the nation's largest minority group. One-half of all Hispanics in the country do not understand English, and approximately two-thirds prefer speaking Spanish to English. By serving Hispanics in their preferred language—frequently the only language they understand—Univision helps Hispanics adapt to American society, politics and life styles.

Univision is the largest producer of Spanish language television programming in the United States, and broadcasts 12 hours of Spanish language news programming each week. The Univision Network's news programs report on events anywhere in the world of interest to Hispanics—*i.e.*, the same events that are of interest to the general population. During January 1989 alone the Network covered official reports or announcements from, *inter alia*, Brazil, Cuba, El Salvador, Great Britain, Libya, Mexico, Poland, the Soviet Union, the United Nations, and West Germany. The official reports broadcast by Univision were "the news of the day" in any language, and were covered by the English media as well.

The Univision Network obtains its foreign news from many sources. Approximately 60% of its foreign news

is derived from video of foreign news events that Univision purchases from VisNews, a British news agency, to which Univision adds Spanish language audio based on the Associated Press teletype. The Network also uses a few foreign correspondents and stringers (freelance reporters) who are hired on a regular basis to prepare particular news stories directly for Univision. These persons are located in Argentina, Brazil, Colombia, El Salvador, Ecuador, Israel, Mexico, and Peru. Occasionally, Univision sends its domestic reporters to cover particular news assignments abroad.

Univision has neither the financial nor human resources to determine the accuracy of foreign government reports, nor does Univision have foreign government sources who could—or would—verify the official reports of these governments. If Univision faced potential liability to persons defamed in foreign government reports, Univision would be unable to broadcast these reports.

The Network prepares a single broadcast for use by all of Univision's wholly owned and affiliated stations, which broadcast to locations in 41 states. Univision cannot create separate broadcasts for different regions of the country, and Univision must therefore comply with the most conservative legal requirements of any of the jurisdictions to which it broadcasts.

Univision believes that the Fourth Circuit's opinion below will cause the media to limit its news coverage of foreign government reports on matters of public interest. Dissemination by the media of both domestic and foreign government reports furthers the interests protected by the First Amendment, and should be granted constitutional protection. Accordingly, Univision joins in petitioners' request for a writ of certiorari from this Court.

SUMMARY OF ARGUMENT

The burdens placed on the media by the decision below will cause self-censorship by the media, in violation of the First Amendment principles articulated by this Court. The Fourth Circuit failed to follow this Court's earlier decisions implying that the First Amendment protects media republication of government reports. Government reports contain information that is vital to the American people in making political and economic decisions, and this Court should recognize that under the First Amendment the media may freely republish the official reports of U.S. and foreign governments without fear of defamation suits.

ARGUMENT: REASONS FOR GRANTING THE WRIT

As stated by petitioner Central Virginia Educational Television Corporation (CVETC), the issue before the Court is whether the media have a First Amendment right to broadcast an accurate and properly attributed account of a foreign government's official announcement, without incurring liability for potentially defamatory material contained therein. The Fourth Circuit held that foreign official reports may not be freely published by the media—a holding which violates this Court's earlier statements of the principles behind the First Amendment and which flies in the face of modern news practices. The opinion below will reduce the free flow of information necessary for the American public to make informed decisions.

A. THE OPINION BELOW, IF ALLOWED TO STAND, WILL CAUSE THE MEDIA TO CENSOR REPORTS ON MATTERS OF PUBLIC INTEREST.

1. The Fourth Circuit's Decision Will Have an Impermissible "Chilling Effect" on the Media.

If the story at issue in this case had been based on a U.S. government report—even a report of a local government from outside the state—it would have been privileged under the common law "official reports" privilege in Virginia. Despite the fact that the announcement of the South Korean government was of public interest in this country, and despite the fact that the South Korean government is a long-time U.S. ally, the Fourth Circuit rejected the announcement as potentially unreliable. (CVETC App. 5)[2]

The Fourth Circuit's decision will reduce the dissemination in this nation of foreign government reports. As the dissenting opinion in the Fourth Circuit indicated, if the official reports privilege is not extended to reports of foreign governments, the media will self-censor these reports. (CVETC App. 13-14) Even the majority in the Fourth Circuit recognized that its decision "might have some chilling effect on newspapers and television stations". (CVETC App. 6)

This Court has repeatedly rejected those aspects of common law libel law that cause a "chilling effect" on or "self-censorship" by the media. Instead, the Court has stated that the First Amendment requires that even

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2. This brief's citations to the Fourth Circuit and District Court opinions are to the copies of those opinions contained in the Appendices to the Petition for Certiorari of CVETC.

some defamatory remarks go unpunished to protect the widest possible dissemination of information of matters of public interest. In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986), the Court held that laws which have a "chilling effect" on publication of matters concerning public issues are unconstitutional, because they are "antithetical to the First Amendment's protection of true speech on matters of public concern". In *St. Amant v. Thompson*, 390 U.S. 727, 731-33, the Court stated that

> the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. . . . To insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protects some erroneous publications as well as true ones.

2. The Fourth Circuit Failed to Adequately Consider the Burdens Its Decision Will Place on the Media.

Although it recognized the "chilling effect" of its decision on the media, the Fourth Circuit found (CVETC App. 7) that

> the burden on the press here in verifying reports from foreign governments does not sufficiently differ in nature or scope from the burden it bears when it receives information from domestic non-official sources.

The majority's view of the burden on the media is simplistic at best.

Univision does not have the resources to investigate reports from foreign governments around the world. Indeed, no broadcaster or newspaper can reasonably be expected to investigate the reports of every foreign government. If Univision is required to verify reports from foreign governments, it simply will not be able to cover these reports. If Fidel Castro claims that certain Americans are plotting to assassinate him, Univision cannot report on his announcement, despite the obvious newsworthiness of such an allegation to Hispanics and to all Americans.

In *Hepps, supra,* 475 U.S. at 776, this Court held that the First Amendment does not permit the burden of ascertaining whether speech is true or false to be placed on the media. The *Hepps* standard should apply to the republication of foreign official reports also, because it will frequently be impossible to ascertain the truth of these reports. It will frequently be the case that only the government issuing the report will know if it is true. Foreign governments may have little incentive to confirm their reports, even if the U.S. media had the resources to attempt to investigate. Foreign governments are not subject to the subpoena powers of U.S. courts, and could not be compelled to substantiate these reports in a later libel action against the media. Despite these difficulties, the Fourth Circuit blithely imposed the burden of "verifying" the truth of reports from foreign governments on the media. Under the holding below, the press is placed in the impossible position of verifying information using a potentially "unreliable" source (CVETC App. 5, 7) that cannot be compelled to respond to legal process.

Moreover, the majority below fails to acknowledge the pace of news events in the modern age. Events

are important when they occur, and not several days later when the media has had a chance—assuming the foreign government would cooperate—to corroborate the foreign news report. Requiring the press to corroborate the reports of foreign governments—even if possible—will delay the American public's access to important information needed to make informed decisions on matters of public concern, and may deprive the public of access altogether.

3. The Opinion Below Will Limit the Media's Ability to Fulfill Its Statutory Obligation to Report on Matters in the Public Interest.

In the Federal Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, Congress imposed on broadcast licensees an affirmative obligation to provide full and fair coverage of public issues. *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 116 (1973).

> From [the provisions of the Federal Communications Act] it seems clear that Congress intended to permit private broadcasters to develop with the widest journalistic freedom consistent with its public obligations.
>
> . . .
>
> Since it is physically impossible to provide time for all viewpoints, . . . the right to exercise editorial judgment was granted to the broadcaster.

Id. at 110. By restricting the broadcast of foreign government reports, the Fourth Circuit has limited the media's exercise of its discretion in determining how to cover public issues, which impermissibly intrudes on broadcasters' editorial freedom. When foreign govern-

ments report on matters of public interest, the broadcast media should be free to republish these reports in furtherance of their statutory obligation to cover public issues.

B. THIS COURT SHOULD RECOGNIZE THAT THE PUBLIC'S RIGHT TO BE INFORMED ABOUT GOVERNMENT REPORTS ON MATTERS OF PUBLIC INTEREST IS PROTECTED BY THE FIRST AMENDMENT.

1. This Court Has Implied That the First Amendment Protects Media Reports of the "News of the Day", But Lower Courts Are Divided on This Issue.

In its libel cases since *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court has recognized that our history is based on a "commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . .", *id.* at 270, and that "freedom of expression upon public questions is secured by the First Amendment". *Id.* at 269. The Court has broadly interpreted the First Amendment to protect the public's access to information on matters of public concern. "There is no power on the part of government to suppress or penalize the publication of 'news of the day'." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 501 (1975) (Douglas, J., concurring).

Although the right to communicate information of public interest is not unlimited,[3]

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3. In *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), a plurality of the Justices extended the *New York Times* doctrine to all events of public or general interest. Another divided

(Continued on following page)

> acceptable limitations must neither affect 'the impartial distribution of news' and ideas, . . . nor because of their history or impact constitute a special burden on the press, nor deprive our free society of the stimulating benefit of varied ideas . . . . [citations omitted]

Curtis Publishing Co. v. Butts, 388 U.S. 130, 151 (1967). The First Amendment places some burden even on private plaintiffs where the subject matter of the speech is a matter of public concern. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (private plaintiff must prove defendant's fault before recovering damages); *Hepps, supra* (private plaintiff must also prove the falsity of the defendant's speech); *Cox Broadcasting, supra* (private plaintiff's right to privacy must fall before First Amendment's protection of right to publish information in official court records).

Lower courts have addressed the media's right to republish government reports through the "official reports" privilege and the privilege of "neutral reportage", both of which are described in CVETC's petition for certiorari. (CVETC Petition 7-9, 13-16) Although this Court

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Footnote continued—

Supreme Court repudiated this language of *Rosenbloom* in *Gertz v. Welch*, 418 U.S. 323 (1974). However, *Gertz* is distinguishable from this case. Although *Gertz* involved a private plaintiff and a public issue (as does this case), *Gertz* did not involve the republication of an official report, but an original article for which the media defendant was held accountable. The facts of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (involving a republication of a rape victim's name available on public court records), are more pertinent. The official reports at issue in *Cox* and in this case are newsworthy in and of themselves, *see Edwards v. National Audubon Society, Inc.*, 556 F.2d 113, 120 (2d Cir.), *cert. denied sub nom. Edwards v. New York Times Co.*, 434 U.S. 1002 (1977), and should be protected by the First Amendment.

has not yet held that the Constitution requires recognition of these privileges, the Court has intimated that constitutional principles protect the reporting of official reports:

> "At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records."

Cox Broadcasting, supra, 420 U.S. at 496. The Court has recognized that the First Amendment protects the republication not only of public official records as in *Cox,* but also of official documents from confidential proceedings. *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829 (1978).

Moreover, in *Time v. Pape,* 401 U.S. 279, 285-86 (1971) (involving the official reports privilege under Illinois law), the Court recognized that

> [a] vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody *said* rather than of what anybody *did.* Indeed, perhaps the largest share of news concerning the doings of government appears in the form of accounts of reports, speeches, press conferences and the like. [emphasis in original]

If the First Amendment is designed to insure that debate on public issues is "uninhibited, robust, and wide-open", then the First Amendment must grant the public free access to official reports, which constitute "the largest share of news".

Some lower courts have interpreted *Cox, Landmark* and *Pape* as requiring a constitutional privilege of fair report. *Medico v. Time, Inc.,* 643 F.2d 134, 143 (3d Cir.),

cert. denied, 454 U.S. 836 (1981);[4] *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113, 120 (2d Cir.), *cert. denied sub nom. Edwards v. New York Times Co.*, 434 U.S. 1002 (1977); *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1127 (N.D. Cal. 1984). Moreover, there is a direct conflict among the circuits on the issue of whether there is a constitutional basis for the "neutral reportage" privilege. *Compare Edwards, supra*, 556 F.2d at 120 (recognizing the privilege), *with Dickey v. CBS, Inc.*, 583 F.2d 1221, 1226 (3d Cir. 1978) (rejecting the privilege), *and Medico, supra*, 643 F.2d at 143 (asserting there is a trend towards recognizing the privilege). The Fourth Circuit's failure to recognize a constitutional privilege in this case increases the confusion among the circuits. Univision joins in petitioners' request that the Court clarify its earlier First Amendment opinions and affirmatively recognize a constitutional foundation for the media to republish official reports.

2. The Rationales for the Common Law "Official Reports" Privilege Are Based on First Amendment Concerns.

Not only has this Court implicitly recognized a constitutional privilege to republish official reports constituting "the news of the day"—which the Fourth Circuit

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4. Although the Third Circuit in *Medico, supra*, based its decision on the common law rather than on the First Amendment, the court stated that

> in both *Cox Broadcasting* and *Landmark Communications*, the Supreme Court articulated the First Amendment value of reports that inform the public of the affairs of government and assist the citizenry in its supervisory duties . . . . *Cox* and *Landmark* provide a constitutional basis for applying a fair report privilege to a controversy which, like the present one, arises from a private figure's damage action for publication of reports not available to the public.

643 F.2d at 144.

declined to acknowledge—but the Court has described the principles behind the First Amendment in the same terms that lower courts have used to articulate the rationales for the official reports privilege.[5]

This Court has recognized both that the media serve as agents for the public in reporting on matters contained in official records and that the information in such records is vital to the public to make informed decisions on public issues.

> In a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.

Cox Broadcasting, supra, 420 U.S. at 491-92. The Court has also recognized that the press performs a vital function in supervising the government.

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5. Briefly stated, the three rationales for the privilege are (1) the agency rationale, in which the reporter is viewed as an agent who describes public events which the public could have viewed itself; (2) the public supervision rationale, in which the media's reports on government actions enable the public to monitor the government; and (3) the informational rationale, under which the public is viewed as having an intrinsic interest in and right to be informed about important matters. These rationales are explained in the majority opinion below. (CVETC App. 3-4) *See also Medico v. Time, Inc., supra,* 643 F.2d at 140-142.

> The Government's power to censor the press was abolished [in the First Amendment] so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.

New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (involving the press' right to publish the Pentagon Papers). The rationales for the "official reports" privilege, then, support the First Amendment principles articulated by this Court, and the First Amendment should protect the media when it republishes government reports.

C. THE FIRST AMENDMENT REQUIRES THAT THE MEDIA BE ALLOWED TO FREELY REPUBLISH REPORTS OF FOREIGN GOVERNMENTS.

In its First Amendment opinions regarding the need "to protect the free discussion of governmental affairs", *Landmark Communications, supra*, 435 U.S. at 838, this Court has never suggested that the discussion should be limited to the affairs of this government, nor that only persons in this country can contribute to the debate. Even the majority below recognized that

> [s]tanding alone, an analysis of [the policy considerations behind the privilege] supports the extension of the official report privilege to reports of foreign government activities.

(CVETC App. 4)

The agency rationale applies as strongly to information that is public in foreign countries as to public in-

formation in this country. Indeed, information from foreign nations may frequently be *more* accessible to Americans than information from other local governments in the United States. It takes less time to travel from New York or Washington to London, Paris or Mexico City than to a small town in Wyoming or Montana. Nevertheless, under the Fourth Circuit's decision below, reports of local governments in the United States would be privileged, and reports of our major foreign allies would not.

The public supervision rationale for the official reports privilege also justifies the extension of the privilege to foreign government reports. Individuals in this country can directly or indirectly affect foreign governments, whether through communication with their own elected representatives about trade barriers or foreign aid, or through public pressure on the foreign governments. One means of improving the reliability of other governments—which was the Fourth Circuit's concern—is through public pressure, which can only occur if our public knows what foreign governments are saying.

Furthermore, citizens of this country cannot fully exercise their influence and supervisory powers over our government without considering foreign opinion. The reports of foreign governments are the "largest share of news" enabling us to see how we are perceived abroad. As a result of recent U.S. government reports about West German involvement with the alleged chemical weapons plant in Libya, West Germans demanded an explanation from their government of its earlier denials of any German involvement with the plant. The U.S. government is no less vulnerable to foreign government reports regarding matters within our borders.

The third rationale for the official reports privilege —the American public's right to know—is the most persuasive rationale for extending the privilege to foreign government reports. As this Court stated in *Curtis Publishing, supra,* 388 U.S. at 147

> "Freedom of discussion 'must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' "

(quoting *Thornhill v. Alabama,* 310 U.S. 88, 102 (1940)). The "exigencies of our period" unquestionably involve issues beyond our borders. As the District Court below recognized, the official reports privilege should be construed broadly "[b]ecause of the United States' substantial involvement in international trade, markets, governments, security, etc." (CVETC App. 24)

> With the tremendous advances in transportation, communications and trade our daily contacts around the world become more important. News from countries around the world increasingly affects our national security, trade, price of the dollar, interest rates, and etc.

Id. (CVETC App. 25)

The Fourth Circuit was concerned that some foreign governments "are not necessarily familiar, open, reliable, or accountable" (CVETC App. 5), and did not want to require courts to make a piecemeal determination as to which governments "exhibit the openness and reliability that warrant an extension of the privilege". *Id.* Univision agrees that a piecemeal approach to this question is unwise, but believes that the Fourth Circuit's lack of confidence in the American public is parochial and

"highly paternalistic"—an attitude this Court rejected in *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 792 (1978). Although some inaccurate information may be contained in foreign government reports, permitting such reports to reach the American public is the only way to insure that members of our society have all the information necessary to cope with "the exigencies of our period".

CONCLUSION

As this Court recognized in *New York Times Co. v. Sullivan, supra,* 376 U.S. 254 at 272 (quoting *Sweeney v. Patterson,* 128 F.2d 457, *cert. denied,* 317 U.S. 678 (1942)), "whatever is added to the field of libel is taken from the field of free debate". The Fourth Circuit has added the reports of foreign governments to the field of libel, although they are clearly a necessary part of the modern discourse on public issues in this nation. Univision asks that this Court grant the petitions for certiorari and resolve whether foreign reports should be returned to "the field of free debate".

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, M. Theresa Hupp. counsel for *amicus curiae* Univision Holdings, Inc., and a member of the Bar of the Supreme Court of the United States, certify that three copies of this Brief of Amicus Curiae Univision Holdings, Inc., were mailed via first class mail, postage prepaid, on February 7, 1989, to Linda Lemmon Najjoum, Hunton & Williams, 3050 Chain Bridge Road, P.O. Box 1147, Fairfax, VA 22030, Counsel of Record for Petitioner Central Virginia Educational Television Corporation, and to Thomas J. Cawley and Stephen M. Sayers, Hunton & Williams, P.O. Box 1147, Fairfax, VA 22030, Of Counsel; Jack G. McKay, 437 North Lee Street, Alexandria, VA 22314, Counsel of Record for Petitioners Sae Gae Shinbo, Inc., The Dong-A Ilbo, The Korea Times, The Cho-Sun Ilbo America, Inc., The Joong-Ang Ilbo Daily News, Inc. and The Korea Herald; Steven M. Schneebaum and Jonathan N. Halpern, Patterson, Boggs & Blow, 2550 M Street NW, Washington, D.C. 20037, and to Larry Garber, International Human Rights Law Group, 773 15th Street NW, Washington, D.C. 20005, Counsel for Respondent Chang-Sin Lee; and Keh Soo Park, 2055 North 15th Street, Third Floor, Arlington, VA 22201, Counsel for The Dong-A Ilbo, The Korea Times, The Cho-Sun Ilbo America, Inc., The Joong-Ang Ilbo Daily News, Inc. and The Korea Herald; and that one copy was mailed via first class mail, postage prepaid, to The Honorable John M. Greacon, Clerk of the United States Court of Appeals for the Fourth Circuit, 10th and Main Street, Richmond, VA 23219.

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Nos. 88-1145, 88-1163

In The

Supreme Court Of The United States

October Term, 1988

The Dong-A Ilbo, *et al.*,
and
Central Virginia Educational
Television Corporation,

Petitioners,

v.

Chang-Sin Lee,

Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF OF RECENT DEVELOPMENTS AND REPLY TO RESPONDENT'S SUGGESTION OF MOOTNESS

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TABLE OF AUTHORITIES

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Preliminary Statement

The petitioners in this case wish to bring intervening matters to the Court's attention pursuant to Rule 35.5 of the United States Supreme Court. Since the two companion petitions for certiorari were filed on January 11, 1989 (No. 88-1145), and on January 12, 1989 (No. 88-1163), this case has been tried in the United States District Court for the Eastern District of Virginia. The case was tried on January 31, February 1 and 2, 1989. An adverse verdict was rendered against six of the seven petitioners. Such an adverse verdict demonstrates why the petition for certiorari in *The Dong-A Ilbo, et al. v. Chang-Sin Lee*, No. 88-1145, should be granted.

Supplemental Statement Of Facts

In his Suggestion Of Mootness, the respondent Chang-Sin Lee ("Lee") correctly but incompletely recites the recent chronology of the trial of this case (Respondent's Suggestion Of Mootness at p.3). What Lee has failed to inform this Court is that although one of the petitioners, Central Virginia Educational Television Corporation ("CVETC"), had a verdict directed in its favor at the close of Lee's case-in-chief, the remaining six newspaper defendants were subjected to a jury verdict in the aggregate amount of $90,000.

Lee has informed this Court and CVETC, in his Suggestion Of Mootness, that he elects not to appeal the district court's decision to direct a verdict in CVETC's favor and that, therefore, CVETC's petition for certiorari becomes moot. As to the remaining petitioners, however, this Court's action could be dispositive on the issue of ultimate liability.

This Case Is Not Moot

Although there are two petitions for certiorari in this case, both raising the same issue,[1] Lee has suggested that only one of these petitions may be moot. The petitioners concede that the authorities cited by Lee would support his argument, yet they invite the Court's attention to its decision in *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 179 (1968), where a controversy was found not to have been mooted because "[t]he underlying question persists and is agitated by the continuing activities and program petitioners...." In this case, as the petition for certiorari filed by CVETC, and as the *amicus curiae* brief filed by Univision Holdings, Inc. ("Univision"), convincingly demonstrate, foreign language broadcasting is a firm fixture in the United States, a fixture which performs important heuristic functions for ethnic minorities living in this country, and which is

[1] The petitioners in No. 88-1145 specifically adopt and endorse all arguments made by CVETC in its petition for certiorari in No. 88-1163, as well as the compelling arguments made by the *amicus curiae*, Univision Holdings, Inc., in both No. 88-1145 and No. 88-1163. All parties consented to the filing of Univision Holdings, Inc.'s brief in both cases.

severely jeopardized by the Fourth Circuit's majority opinion. The underlying question, therefore, undoubtedly persists in this case.

Even if CVETC's petition for certiorari should be adjudged to be moot by reason of its success in the trial court and Lee's decision not to appeal, the petition filed by the remaining six newspaper petitioners presents a very real case and controversy. The implications of a libel judgment against media defendants who merely report the news, accurately and impartially, as the court below noted (*see* CVETC App. 16), should send a chilling shudder down the spine of the First Amendment. This is especially the case when the newspapers reported a foreign government's official announcements disinterestedly, fully, and without embellishment or endorsement, as in this case.

For the reasons stated in CVETC's petition for certiorari and Univision's *amicus curiae* brief, the Fourth Circuit's decision cannot withstand constitutional scrutiny. This case presents important, live and novel constitutional questions regarding the "freedom...of the press" guaranteed by the First Amendment, a freedom which is diminished if the Fourth Circuit's decision is permitted to stand unreviewed.

Conclusion

The Suggestion Of Mootness filed by Lee goes only to one of the petitions filed in this case and, even if well taken, cannot affect the vitality of the questions presented in No. 88-1145. The case is not moot and a writ of certiorari should be issued to review the judgment and opinion of the Fourth Circuit.

Respectfully Submitted,

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Certificate of Service

We , Jack G. McKay and Linda Lemmon Najjoum, counsel of record for the Petitioners, and members of the bar of the Supreme Court of the United States, certify that three copies of this Petitioners' Supplemental Brief of Recent Developments and Reply to Respondent's Suggestion of Mootness, were mailed by certified mail, return receipt requested to Don A. Allen, Esq., Patton Boggs & Blow, 2550 M. Street, N.W., Washington, D.C. 20037, and Steven M. Schneebaum, Esq. and Jonathan N. Halpern, Esq., of the same firm and at the same address, counsel for the respondent Chang-Sin Lee; and to M. Therea Hupp, Esq., P.O. Box 419126, 2501 McGee Trafficway, Kansas City, Missouri 64141, counsel of record for the Amicus Curiae Univision Holdings, Inc.

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